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FILED
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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

**No. 16**

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR PETITIONERS.

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## THE REVELATION TO BUSBY AND HIS ADVICE TO DISCLOSE.[8]

In response to Lubben's request for a further loan Cain, in January 1948, sent Leon Busby, Shotwell's outside auditor (App. 1024), and H. Stanley Graflund, Shotwell's comptroller, east to ascertain Lubben's financial position. Up to that time outsider Busby had known nothing about Shotwell's over-ceiling transactions (R. 169, G. Ex. 213).

It was from what Busby learned on this January 1948 trip (R. 170, 211-2, 1827, 1829) from Lubben's books and from revelations by Graflund (App. 1126-1130, 1198-1204) as to the over-ceiling transactions, that the disclosure stemmed. (It was charged to this court in 1957 that Graflund had *not* revealed the over-ceiling facts to Busby during that trip; that Busby knew nothing of them until approximately July 1, 1948, and hence would have been unable to advise a disclosure prior to the latter date.)

(Judge Nordbye now has found that Graflund *did* make the revelation to Busby on the January 1948 New York trip just as Busby originally testified (App. 1760).)

Busby immediately (a) reported to petitioners that Lubben was in hopeless financial condition, and (b), upon receiving confirming admissions from Cain and Sullivan of

8. The pivotal charge made to this Court in the 1956-1957 proceedings was that the disclosure simply could not have taken place in early 1948 as claimed by petitioners because petitioners' outside auditor, Busby, who advised that it be made, had not been informed of the transactions in early January 1948, and in fact knew nothing about them until approximately July 1, 1948, and, hence, could not have made the disclosure to Revenue Agent Sauber prior to the latter date. That charge was found, on the new hearing which this Court ordered, to be erroneous (App. 1760).

We respectfully direct the Court's attention through the succeeding pages of this brief to the fact that many of the record references are to the old original R. record while others are to the new hearing App. record. We suggest that this indicates how well the new App. record supplements and confirms the old R. record which was so wrongfully charged to have been perjurious.

the over-ceiling transactions (R. 204, 1826), informed petitioners that Shotwell had an income tax problem because petitioners were wrong in their assumption that over-ceiling disbursements for raw materials could be used as an offset or deduction against over-ceiling receipts (R. 170-172, 206, 207, 1828-1831). He pointed out that under Treasury regulations then in force no deduction could be made for over-ceiling premiums (See 355 U.S. at 238, n. 12). Busby advised that a voluntary disclosure be made (R. 172, 1831, 2608-2609).

## THE DISCLOSURE.

Busby was directed to find out precisely what the disclosure procedure would be (R. 174, 226-8, 248) for although he was familiar with the Treasury's published statements on the subject this was the first disclosure he had any experience with (R. 201). Busby testified he went to the Collector's office and discussed the matter with Chief Deputy Collector Ernest Sauber during the week following January 11, 1948 (R. 173-4, 213, 2832-2833), and Cain says that Busby reported back to him not later than the end of January (R. 229-30, 250). Chief Deputy Collector Sauber recalled the first visit as approximately March 15 (R. 282).[9]

The first visit was exploratory, for although Busby described the nature of the black market operations, he did not reveal the name of his client. Sauber told him that "if

9. Throughout the original 1952 suppresion hearing there was a running difference of four to six weeks in the recollections of Cain and Busby on the one hand and Sauber on the other as to when various disclosure events had taken place. On the Government's then theory that Dec. 16, 1947 marked the "timeliness" date (R. 445), this difference was immaterial because any disclosure after December 16, 1947 would have been unavailing. Had *precise* dates in the spring of 1948 been material in 1952 it is to be assumed that counsel on both sides would have done more to clarify the time steps.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR PETITIONERS.

### OPINIONS BELOW.

The case is here for the second time. Original 1955 opinion of the Court of Appeals for the Seventh Circuit, which reversed convictions of petitioners for asserted income tax evasion because evidence was used against them which had been obtained from them by promising them immunity from prosecution, is reported at 225 F. 2d 394.

This Court's 1957 opinion, remanding for limited proceedings to determine whether the Court of Appeals order for a new trial was based upon a perjured record upon the suppression hearing is reported at 355 U. S. 233.

The 1959 opinion of Judge Nordbye upon the remanded proceedings, finding no perjury in the original suppression testimony but nevertheless denying a new trial and resentencing, is not reported but appears at App. 1754, *et seq.*[1]

The 1961 opinion of the Court of Appeals for the Seventh Circuit affirming the new judgments is reported at 287 F. 2d 667, and appears at S. 291 ff.

Separate from the merits of the case are questions as to whether proper jury selection procedures were followed in the selection of persons from whom were formed the indicting grand jury and the petit jury before which the case was tried. The unreported opinion of Judge Nordbye on that issue appears at App. 429, *et seq.*

## JURISDICTION.

The judgments of the Court of Appeals were entered February 8, 1961. Timely petition for certiorari was allowed by this Court December 18, 1961. Jurisdiction is invoked under 28 U. S. C. Section 1254(1).

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1. The printed record before the Court is in several parts:

a. The record of the original suppression of evidence hearing (1952) and jury trial (1953) is in seven terra cotta colored volumes. References to it will be made as "R. ....." Accompanying that record are two buff covered volumes entitled Exhibit Volumes 1 and 2. References to these will be made as "Ex. .... Vol. ...."

b. The record of the remanded hearing (1958-1959) is in three cream colored volumes entitled "Appendix to Brief," etc. References to it will be made as "App. ....."

c. Part of the evidence as to the jury selection procedures is in a cream colored volume entitled "*Sullivan* v. *U. S. District Court*," "Appendix in Support of Petition for Mandamus," which was received as part of the evidence on the remanded hearing. Included in that volume is the record of the Court of Appeals on the last appeal. References to this volume will be made as "S. ....."

## QUESTIONS PRESENTED.

1.

Whether the admission in evidence of documents and information furnished by petitioners in reliance on the Government's promise of immunity from prosecution violated petitioners' rights under the Fourth and Fifth Amendments and the common law rule excluding incriminating material induced by such promises.

2.

Whether criminal justice and the processes of this Court were abused and a fraud worked on the Court by inducing it to delay action for nearly a year and ultimately to remand the case by the device of concealing from the Court that the witnesses whose affidavits were presented to it (and one from whom testimony was promised) had repeatedly sworn to the contrary of what was represented to this Court before, or while, the motion to remand was pending and changed their testimony only after being subjected to repeated interrogations, "refresher courses" and other sophisticated forms of pressure by Government agents.

3.

Whether it was either a denial of due process or a violation of civilized standards for administration of justice for the District Court to re-enter judgments of conviction after the Court had found on the reopened hearing that the principal witness for the Government on the original jury trial (Lubben) had given seriously false testimony to the jury on a vital issue.

4.

Whether petitioners had to show they were "actually prejudiced" by illegal jury selection procedures utilized in selection of the arrays of both the indicting grand, and the petit juries by which (a) jurors were selected from the private list specifically condemned in *Glasser* v. *U. S.*, 315 U. S. 60, as well as other private lists, and volunteers were accepted contrary to the Illinois statute, and (b) the Jury Commissioner delegated his non-delegable duty of selection of prospective jurors to an employee of a private corporation of which he was president.

5.

Whether the jury could be instructed it might consider evidence against Sullivan which had been ruled inadmissible as to him; and instructed that the disclosure was defective.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendments 4 and 5.
26 U. S. C. (1952 ed.) Sec. 1371 (Internal Revenue).
28 U. S. C. (1952 ed.) Secs. 1861, 1864 (Jurors).
Illinois Revised Statutes 1951, Chap. 78, Sec. 13 (Jurors).

(Texts are shown in Appendix A hereto.)

## STATEMENT.[2]

When this case was first here the Court found (355 U. S. at 234) it presented "an unusual question involving the integrity of a criminal trial in the federal courts." This question arose from a claim that testimony by defend-

2. Because the history of the case is complex we supplement our "Statement" with a "Chronology of Litigation and the Re-Investigation" which appears as Appendix C hereto.

ant Cain, defense witness Busby, and Government witness Sauber, given in the District Court in 1952 on petitioners' motion to suppress evidence, had been a gross fraud in that it purported to describe a "voluntary disclosure" of income tax irregularities that, so it was asserted, had not taken place at all. This Court, in 1957, remanded the case to the District Court to hold a hearing to ascertain whether "the [1955] decision of the Court of Appeals [directing suppression of evidence] was based upon a perjurious record."

The new hearing, held in late 1958, resulted in an opinion by Judge Nordbye in 1959 which, although using harsh language against petitioners, does not find that a syllable of perjury had been given in 1952 as to why, when or how the disclosure was made; Judge Nordbye finds that the disclosure, whether technically perfect or imperfect, was made as originally had been testified; it was not a perjurious invention.

The "new" evidence showed, as admitted by the Brief for the United States in Opposition to the Petition for Certiorari leading to the present proceedings, that a "public offer [of immunity] was made to all taxpayers [by the Treasury]; that petitioners, who had not even been accused, voluntarily came forward and admitted unreported receipts" and did so because they "wished to avail themselves of the offer of immunity" (Br. in Opp., 13).

The District Court in 1959 found that the voluntary disclosure had been made, it nevertheless was, in his opinion "fraudulent" because it did not square with his beliefs as to the merits of the tax case.

The District Court re-sentenced petitioners although the evidence showed, and the Court found, that the claim of a voluntary disclosure was true and that material obtained from petitioners by promising them immunity was used to

convict them. The new hearing also showed (a) that the juries which indicted and convicted petitioners were illegally composed; (b) that the 1952 convictions had been based upon perjured evidence by the Government's then star witnesses, which the jury had accepted as true; (c) that this Court's 1957 order of remandment had been obtained by withholding from this Court highly important exculpatory evidence that was to the precise contrary of the assertions the prosecutors made to it in 1956 and 1957.

Decision of the issues requires, in our judgment, a complete statement of the case so that the various unusual events may be seen in proper focus.

The facts set out below are uncontradicted save where we indicate instances of dispute.

## THE INDICTMENT.

In 1952 petitioners and Frank J. Huebner were indicted in the United States District Court for the Northern District of Illinois for (allegedly) wilfully attempting to evade a portion of the corporate income taxes of The Shotwell Manufacturing Company for 1945 and 1946. The substance of the indictment (R. 5-6), as explained by a bill of particulars, was that the Shotwell Company had received $500,000[3] of unreported receipts on sales of its product, candy, to one David L. Lubben, or companies he controlled, and that this resulted in a tax deficiency of $286,000 beyond the $827,000 that Shotwell had paid. Petitioner Cain was President of Shotwell during the relevant periods; petitioner Sullivan was Executive Vice President and General Counsel; Huebner was Vice President and Plant Manager.

Defendants filed a motion to dismiss (R. 10 ff.), which

3. Throughout this brief, unless otherwise indicated, we use round figures.

was the equivalent of a plea in bar, alleging that in January 1948 they had made a timely, voluntary disclosure of unreported income from Lubben pursuant to invitations by the Treasury promising immunity from prosecution to those who would make such disclosure prior to independent investigation being initiated by the taxing authorities.[4] This motion, in both original and amended form (R. 612) was denied by the District Court on the legal grounds that "uncompleted negotiations for compromise" cannot raise an estoppel (R. 98) and that any pardon or amnesty was beyond the authority of officials of the Internal Revenue Department (R. 617). The legal effect of these rulings was that, assuming a valid voluntary disclosure had been made, the immunity promised by the Treasury was not judicially enforceable. Had the government controverted the factual averments of this motion petitioners would have been entitled to a jury trial on the issue of whether they had made a good disclosure.[5] (Petitioners never have waived that right. It was called to the attention of the Court of Appeals on the first appeal and to the attention of this Court in the Conditional Cross-Petition for Certiorari in the initial proceedings here. See Condl. Cross-Pet. No. 471, O. T. 1955, p. 4, n. 3.)

## THE MOTION TO SUPPRESS.

Petitioners next filed motions (R. 120 ff.) to suppress voluminous documentary evidence they had specially prepared for, and delivered to, treasury agents who investigated Shotwell in pursuance of the disclosure. An evi-

4. Official statements of the "voluntary disclosure policy" are collected in Appendix B hereto.

5. Rule 12(a) provides that a defense formerly raised before trial by plea shall be raised by motion. At common law a defendant was entitled to jury trial, before a separate jury, of any issue of fact raised on a plea in bar. *Short* v *United States*, 4 Cir., 91 F. 2d 614, 619; *Commonwealth* v. *Merrill*, 90 Mass. 545, 546, 547.

dentiary hearing on the motion to suppress, without a jury, was held in 1952 (R. 168-453). (It was as to this hearing that the prosecutors' subsequent charges of rampant perjury were leveled in this Court.)

The motion to suppress (R. 120 ff.) alleged that in January 1948, in reliance upon repeated announcements by the Secretary of the Treasury, the Commissioner of Internal Revenue, and other responsible Treasury officials, to the effect that persons whose income tax returns contained omissions or misstatements would be immune from criminal prosecution if they voluntarily came forward before investigation had been initiated by the Treasury and disclosed such errors, petitioners did come forward and made such disclosure in respect of the returns of the corporation for the years 1945 and 1946; that thereafter they turned over voluminous records and documents and assisted the tax agents in making an investigation pursuant to the disclosure; that this was all in reliance upon the promises of immunity.

The hearing upon this motion is best understood in relation to basic facts in the relationship between the Shotwell Company and Lubben:

**BASIC RELATIONS BETWEEN SHOTWELL AND LUBBEN.**

Shotwell was a candy manufacturer in Chicago; Lubben a candy broker in New York. Early in 1944 Lubben acquired a candy distributorship known as Eatsum Food Products and thereupon operated it as a sole proprietorship (R. 788). In June 1945 Lubben converted Eatsum into a partnership in which his principal partner was one Giglio, a black market operator of whom he was in mortal fear at time of trial herein in 1953 (R. 1061).[6] In March 1946

6. Giglio subsequently was held guilty of tax evasion. See *Lawn* v. *United States*, 355 U. S. 339, which determined his case. The "partnership" between Lubben, Giglio and others is described in that opinion p. 342, n. 3.

(R. 1962) Lubben withdrew from partnership with Giglio and did business through a corporation, General Confections, Inc.

Shotwell's situation was as follows: In the summer of 1945 an acute shortage of corn syrup, necessary to the manufacture of Shotwell's candy, developed because OPA ceilings on corn had become so unbalanced in relation to those on hogs that it was much more profitable for farmers to feed their corn than to sell it at ceiling prices to corn refiners. As a result the corn refiners informed Shotwell, and all other candy companies, that if they wished to obtain corn syrup, they would have to procure the raw corn necessary for its production (R. 222-225, App. 863-8, 1028, 1290, 2546-7).

Lubben had become a customer of Shotwell in the spring of 1944. He was not a substantial customer until 1945. (See D. Ex. 1, Supp. hrg., R. 3091 ff.) His first contact with any official of the Company was with Huebre , to whom he had been introduced as a person who could arrange so-called "trade deals" by which firms having surpluses of materials in short supply made them available to others in various types of exchanges of goods (R. 792-3, 2006-9, 2055, 2061, 2571, 2544-2545). Lubben asked whether he could have the Shotwell line as a broker in New York if he was able to get chocolate for Shotwell (R. 793-795, 2060).

It is the Government's contention that Lubben offered to, and did, pay black market premiums on all candy he bought from Shotwell. It is petitioners' contention there were no over-ceiling transactions with Lubben, at least so far as Cain and Sullivan were aware, until the fall of 1945. Whatever the true fact may be as to that, it is undisputed that because of the corn syrup shortage which had developed by June 1945, and which limited Shotwell's ability to produce candy, Shotwell was forced to drop many customers. Lubben was dropped from June 27, 1945 until

September 29, 1945 (D. Ex. 1, Supp. hrg., R. 3093, App. 782).[7] Petitioners contend that at about the latter date Lubben came to them and offered to pay unrecorded cash premiums above ceiling prices for candy, which unrecorded cash Shotwell could then use, without alerting Office of Price Administration inspectors (R. 774, Cf. App. 784-785), to pay unrecorded over-ceiling cash premiums on raw corn. The owners of the corn, having received the premium, then made the corn available at ceiling prices to refiners; they in turn made the resulting corn syrup (or other corn product) available to Shotwell at ceiling.

The corn market at these times was so disarranged that the Government itself was buying corn at over-ceiling prices (R. 2420, 2682, 2709, D. Exs. 89, 90 and rejected Ex. 74). By October 1945 cash corn had virtually disappeared from the market (R. 2372, 2376-7). OPA ceilings were removed from corn on June 30, 1946. The shortage of syrup immediately disappeared. It is petitioners' contention that all over-ceiling transactions then ceased. The Government contends they continued until nearly the end of 1946 although its own evidence is that the "corn box" through which the transactions were handled was closed on July 26 and 27, 1946 (App. 1227-8).

Although there is great dispute as to the amount of so-called "overages" or premiums that Lubben actually paid Shotwell (or any one connected with it), petitioners do not dispute that Lubben did, for approximately nine months, pay substantial premiums, and, although the Government does not agree that *all* that Shotwell received (except a

7. Petitioners' action of dropping Lubben as a customer is a fact, we contend, grossly inconsistent with the Government's contention that Lubben had theretofore been paying "overages" which somehow found their way into the pockets of the individual petitioners. If such a course of personal enrichment had been going on it seems highly unlikely that Lubben would have been selected as a customer to cut off.

small terminal balance) was paid out for corn, it concedes that Shotwell did pay out large amounts as cash premiums on corn. (At the 1958 hearing Huebner conceded that Shotwell paid premiums on at least 300 cars of corn at rates up to $1,000 a car. App. 862-3.)

Likewise, there is no dispute but that Shotwell had a so-called "corn box" for about 9 months (App. 1213) in which cash coming from Lubben was placed and removed on instructions from Huebner to pay premiums for purchases of corn. Huebner, who personally handled most of the transactions, now says that in the process some $45,000 of funds emanating from Lubben found its way into his personal pocket, some with, some without the knowledge of Cain and Sullivan. Cain and Sullivan swear that they personally never got any of this money (R. 262, 2638). In any event, at the time in question, 1945-1946, petitioners assumed that all cash emanating from Lubben was expended for corn (except a terminal balance of approximately $6,000 on hand when the corn shortage ended, which was carried into the Company's books of account and tax returns), and assumed that although there had been OPA violations which they wished to conceal, there was no income tax problem because the company had paid out what it took in (R. 205, 782, 1827-8, 2554, 2585).

In the middle of 1947 Lubben, who meantime had become a candy manufacturer himself, fell into financial trouble and asked Shotwell for a loan. In July 1947 petitioner Cain arranged for the Sterling Bank of New York to make a $75,000 loan to Lubben which Cain guaranteed (R. 2602). Lubben in turn gave Cain, as agent for Shotwell, a mortgage on his properties (R. 1023, 2552, 2604, 2658-61). Near the end of 1947 Lubben experienced additional troubles and wanted an additional $50,000 loan (R. 2552, 2641).

the disclosure is timely and the facts that I had related to him were correct, he saw no reason why the immunity policy of the Bureau should not be applied" (R. 174-5). Busby reported this to petitioners and was instructed to disclose Shotwell's name. Petitioners' purpose was to avoid criminal prosecution (R. 250). Within two or three days (R. 177) Busby went back to Sauber and disclosed Shotwell as the taxpayer. Sauber said he was a proper officer to whom a disclosure could be made (R. 200).

At this time, as on several other occasions, Busby (and later Cain) told Sauber that Shotwell had no figures and would have to reconstruct the account (R. 178, 202, 229, 231-3, 283, 284, 286, 2564, 2570, 2577, 2590). Sauber said that because petitioners had no records of these transactions they could not file an amended return and should gather "such information as we could from any memorandum or memory and summarize it;" that he would contact the office of the Agent in Charge and have an agent work with them for the purpose of getting together the facts on which an assessment could be made (R. 178). Sauber advised that rather than attempting to file an amended return it would be better to wait until an Agent came out and determined the amount on a basis that could be acceptable to the Department (R. 202). Busby made it clear that the taxpayer wished to make a disclosure and to make whatever corrections and payments of taxes were necessary (R. 202).

According to Busby, in late January or early February he brought petitioner Cain to Sauber's office and introduced him as the president of Shotwell. Cain told Sauber he understood he could make a disclosure without fear of prosecution (R. 181). The three had a lengthy discussion. Cain was worried about publicity. Sauber told him it was strictly a civil case and he had nothing to worry about as far as publicity was concerned (R. 285). It is Busby's tes-

timony that in January he asked Sauber to ascertain if any investigation of Shotwell had been initiated. (Sauber placed the dates of these meetings as approximately six weeks later.) It is undenied that in March Sauber reported he had checked with Group Chief Johnson and that no investigation had been commenced (R. 231, 257).

**THE SUBSEQUENT PREPARATION AND SURRENDER OF DOCUMENTS LATER USED TO CONVICT PETITIONERS.**

The work of assembling data as Sauber had requested, from which to reconstruct the Lubben transactions as aid to the Treasury in making a civil assessment commenced. In late January or early February, Huebner visited Lubben at a farm the latter had in New Jersey and asked to see such of his records as were available. Lubben showed Huebner papers which he said were partial records of Eatsum and General Confections pertaining to premiums supposedly paid to Shotwell (R. 867, *et seq.*). Some of these were delivered to Huebner (R. 1315) who took them to Chicago where Graflund went to work to see how they "jibed" with his information. He reported to Huebner they were "so far out" there was "no point in trying to compare this" (App. 1166).

In February 1948, Huebner who, according to the false representations made to this Court, supposedly knew nothing about the disclosure, told representatives of Close Candy Company of Chicago, which also had engaged in over-ceiling transactions with Lubben, that "a disclosure would have to be made" by Shotwell of its over-ceiling transactions; the Close representatives "begged" him not to because "it would upset the apple cart" on them and "a lot of other people" (App. 1168-1171).[10]

10. The Government evidence that Huebner, in February 1948, was warning Close Candy Company that Shotwell would have to make a disclosure was given by Government witness Graflund on

By the beginning of March petitioners realized Lubben was in a bitter dispute with his former partner, Giglio. They realized he had motives, with respect to the Government and Giglio, for claiming he had paid out as much money as he possibly could. They knew also that any reconstruction of the Lubben transactions which they prepared would be checked by Treasury agents with whatever Lubben's supposed books showed or what Lubben said had happened.

The individual petitioners are men of high standing (R. 2686-2703) who were ashamed they had become involved in a tax dispute and didn't want anybody to know about it (R. 2619). They wanted no dispute with Lubben. In March, Cain arrived at a policy decision which he promptly communicated to Sauber as follows:

> "• • • that the only thing that we could possibly do in dealing with a chap like this chap Lubben would be to take every invoice that we had sent to him and apply the maximum over ceiling price.
>
> "• • • I said there definitely had been trade deals with Mr. Lubben, but there was no way for us to separate them" • • • I told him this—this thing started slow • • •. Then it reached up like the corn market did to a peak. • • • I said we will use the peak price and when we come up with that figure, that would be the best of our recollection." (R. 232.)

As to over-ceiling expenditures, he said,

> "As to our expenditures I just can't tell you anything. I don't know."

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the new hearing. It is petitioners' contention that in fact Huebner by that time knew the disclosure already had been made and was being less than frank with the Close personnel. In any event, this item of proof demonstrates that Huebner then knew, contrary to his subsequent affidavit to this Court (Supp. to Mo. to Remand, Nos. 9 and 10, O. T. Term 1956, p. 8) that a disclosure either had been made or was in immediate contemplation.

11. Huebner in his first interview with Government agents in 1956 confirmed that there had been "trade deals" (App. 750).

Sauber said,

> "It wouldn't do any good if you did know because we wouldn't allow them anyway. We absolutely won't allow over the ceiling expenditures." (R. 232.)

Cain told Sauber that in view of the Government making no allowances for over-ceiling expenditures, Shotwell owed a lot of money but stood ready and able to pay it, but that wouldn't stop them if at some future time they tried to get their money back, or a portion of it, for these over-ceiling payments. Sauber replied:

> "That is perfectly all right. All we want to do is get the tax. That is my job. I am a collector and I want to get the tax." (R. 232.)

All of this is uncontradicted save that Sauber placed the latter conversation in April rather than March 1948 (D. Ex. 3, Supp. hrg., R. 3155, 286). In any event, Sauber said he would ask the Revenue Agents who had charge of such matters to commence an audit (R. 257, 286, 3155). Sauber then phoned Agent Johnson and asked him to do this (R. 286).

Cain's instructions to use the highest premium prices in preparing data to be submitted to the investigating agents, to disregard all "trade deals" and to consider that on every invoice Shotwell got additional cash, even if it did not, were adhered to when, some three or four months later, a reconstructed account or "summary" was prepared: Huebner on the 1958 hearing admitted that "the highest amounts were put into the account by orders of Byron Cain, who said to put everything in those figures possible that he [Lubben] could say he paid us money on. We put a lot of figures on there that Mr. Cain instructed us to do, put the highest amount we possibly could have gotten from Lubben" (App. 797-800; see also App. 967-8). Graflund agreed that Cain instructed, "I want everything

put down you possibly can" (App. 1063). Graflund testified that the compilers of the data (which is the subject of the Motion to Suppress) put everything in at the top price whether right or wrong, for the purpose of trying to have the summaries "tie into" and "jibe" with Lubben's supposed papers (App. 1245-7) (cf. Busby at R. 2817; 2835).

The effect of this system of agreeing with what were understood to be Lubben's claims was (1) any open controversy with Lubben's figures that might have resulted in a public hearing which would have disclosed that petitioners had, to a degree, been in the black market was avoided, (2) possible criminal prosecution was, so believed petitioners, avoided, but (3) since the compilations "admitted" receipt of considerably more than Lubben had actually paid, petitioners could not possibly account truly for disbursing that portion that had not been received.

Cain summarized the work of compiling data after the disclosure had been made as follows:

> "We started out to make a compilation. We were primarily interested in over ceiling payments to us, anything that could be charged to us. That is the only thing we were interested in.
>
> "So we started out to assemble that data and as things usually do, the agent didn't appear and he didn't appear, so it dragged.
>
> "The minute he appeared everybody went to work on it again.
>
> "Mr. Busby, I think, had a man working on it continuously from about, oh, January, February, right on through, but then we put the whole staff on it, Mr. Huebner, and the whole gang of us got to work, Mr. Sullivan, and we assembled what would give him something to go by and we told him that." (R. 233.)

Graflund, in 1953, in describing these events to the Government gave a report which agent Krane summarized as follows:

"April or May, 1948—preliminary discussion—Cain —Busby—general discussion—real work on figures did not start until after Krane came." (App. 1156-1157.)

Busby summarized the work as follows when he testified on the trial before the jury:

"The compilations on that sheet (G. Ex. 186, Ex. Vol. 117; also at R. 3087 and 3096 and in longhand, R. 3090) ran over a period of three or four, five, months, beginning in January, after I had made the disclosure."

By the Court: "January of what year?"

By the Witness: "January, 1948, down through June: Part of the time I didn't work on it. I was on vacation, but the work covered that span of time." (R. 2837; See also, R. 2585, 2590.)

As the spring of 1948 wore on no agent appeared to make the examination. Sauber admits that Cain telephoned him to get the work started because the company wanted to put a statement on its balance sheet and go ahead with plans to issue additional stock. Sauber told him to be patient (R. 287).

In June, 1948 petitioner Sullivan was confined to St. Joseph's Hospital in Chicago. Edmund B. Horgan, the Chief Office Deputy in the Chicago Internal Revenue Office and a friend of Sullivan's for some years was confined in the same hospital a room or two away. Both had the same doctor who informed each of the other's presence (App. 1566-69). On June 4, Sullivan, preparing to leave the hospital, visited Horgan and loaned the latter his portable radio (App. 1570). Sullivan complained to Horgan about the Bureau's delay in investigating and closing the case. Horgan offered to talk with Sauber on the telephone from the hospital and immediately did so, telling Sauber that Sullivan was inquiring as to the delay. Sauber replied that Horgan ought to know that "• • • the agent's office does

not do things in a minute. I have reported the case to the agent's office and in due time they will get around to it." (App. 1570.[12])

## THE KRANE VISIT DURING PERIOD DATA WAS BEING ASSEMBLED.

On June 21, 1948 occurred the event around which basic Government contentions when the case was first here revolved: the visit of Agent Sam Krane of the Chicago Revenue Office to the Shotwell plant to pick up information for use of Revenue Agents in New York who were investigating Lubben.

It was contended to this Court in 1956-1957 that a disclosure after June 21, 1948 would have been "untimely" (Br. for U. S. No. 1, O. T. 1957 p. 33) and that the Government's "new" evidence would show that "*no* move was made by respondents [petitioners] to disclose the corporation's unreported black market receipts prior" to this visit (Id. p. 25, also this Court's opinion in 355 U. S., notes 13 and

12. No evidence as to the Sullivan-Horgan conversations which are confirmatory that the disclosure had been made considerably before June 4, 1948 was given at the 1952 hearing for the reason that on the Government's then theory of a December, 1946 "timeliness" date it then was immaterial.

In 1952 the Government took the position that a disclosure made at any time in 1948 was untimely because the "timeliness" date was December 16, 1947 (R. 445). That contention was subsequently abandoned.

When the case first came to this Court, and for a time in the 1958 hearings, it was contended (incorrectly) that the "timeliness" date was June 21, 1948. With the prosecutors advancing such a theory the Horgan-Sullivan conversation showing that the disclosure necessarily was earlier than June 4, 1948 (and had been made to Sauber) became material. Had it not been for Sullivan's incidental kindness of loaning the radio, the incident, with the important date which could be fixed through hospital records, might have been forgotten.

21[13]). The supplemental hearing disproved those sweeping assertions. The new finding is that, "The exact time that Busby made a visit to Sauber's office is difficult to pin point, and although the Government contends that it was not made until after the visit of Agent Krane to the Shotwell plant, my view from all the evidence is that it is fair to find that Busby did visit Sauber about Shotwell's taxes some time before Krane's visit" (App. 1760-61). (Agent Sam Krane, who performed the errand for New York officials, subsequently was assigned to *the Shotwell case* but on the June 21, 1948 visit he was not investigating Shotwell at all.)

At the time of the Krane visit of June 21, Cain, Sullivan and Huebner were in New York attending a candy convention; while there they sought, and obtained (R. 2557) in their effort to reconstruct the Lubben transactions, information from Lubben's former auditors, Sproull, Scholz & Company, as to Lubben's transactions (App. 657-8, 794-6, R. 2815, 2824). They also received information from one Tobias, former accountant for Lubben but then connected with the New York Revenue Office, that Lubben had doctored his books so as to charge various items against Shotwell that he had not actually paid it (App. 790-796). When Agent Krane made his call at the Shotwell plant, Graflund reported the visit by telephone to Cain in New York. Graflund at the 1958 hearing asserted that Cain criticized him for delivering any material to Krane (App. 1046).

13. The prosecutors' unsound contention when the case was first here was unstinted: "The new evidence indicates that the testimony which placed the date of the so-called disclosure in January or March 1948 was perjurious • • •. *In fact, the so-called disclosure took place in July 1948*. This was subsequent to the occasion (on June 21, 1948) when Special Agent Krane called at the corporation office • • •" (Id. p. 33). "The new evidence • • • affirmatively shows that it did not take place until this later [July] date" (Id. p. 33, n. 27).

## PREPARATION OF THE SUMMARY.

Shortly after the return of Cain, Sullivan and Huebner from the New York candy convention Cain took personal charge of preparing the summary to be tendered to whatever Examination Agent appeared to examine Shotwell in pursuance of the disclosure. Cain assembled Shotwell people who knew about the transactions at the Belden Stratford Hotel, in which he was interested, so they could avoid distractions of regular duties and complete the task that had dragged for so long (App. 1179).

Every Shotwell-Lubben transaction was now listed on large accounting sheets. (Reproductions appear as D. Ex. 1, Supp. Hrg., R. 3091-95, and in revised form as D. Ex. 2, Supp. Hrg., R. 3097-3101; the latter is also G. Ex. 189-A to 189-E, Ex. Vol. 1, 122 ff. The clearest reproductions are those attached to our Pet. for Cert. 85-90.) Each sale (App. 749) was listed by date and invoice number. On the right-hand side, under the heading "Memo taken from Lubben Record", were shown the amounts as shown by "His record" and the amounts "He added" as supposed premium. Many of Lubben's alleged records were missing. In such cases estimates were made in order to have a reconstructed account that would jibe with what Lubben's "exaggerated" and untrue claims were understood to be (R. 2814, 2816, 2817, 2841[14]).

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14. It was clearly established by Government witnesses on the supplemental hearing that Lubben's so-called "records" had been altered to show as charges against Shotwell items that had been paid to different companies (App. 969); that he "lied on the stand" to the jury in 1953 (App. 809) when he testified in accordance with such doctored records. The District Court, contrary to his 1953 view that Lubben was sincere and truthful when before the jury, found as a fact after the 1958 supplemental hearing that it is "entirely probable" that Lubben "exaggerated" in 1953 as to the amounts of his payments (App. 1758). The precise amount of the "exaggeration" remains in dispute. We say a fair interpretation of the District Court's findings is that the "exaggeration" was at least $132,000; we believe the evidence shows it was much more. See p. ...., *infra*.

Although Graflund thought the true amount of "premiums" or "overages" involved was around 100 thousand dollars and Huebner thought it couldn't exceed between 150 and 160 thousand dollars, including trade deals (R. 2835), the figures compiled in the manner described totalled about 400 thousand dollars, at which figure all were amazed (R. 2564). Cain repeated his instruction, "I don't care how much money came in. I don't care. Just get the absolute ceiling this guy [Lubben] could possibly charge us with, get the absolute ceiling. He is a super-salesman and I don't want any traffic with him at all. Let's put the absolute ceiling in and then let the government assess us, even if it is three or four times as much as we owe" (R. 2564). (Note that Cain understood he was inviting a large assessment and had reserved the right of possibly trying "at some future time" to get some of his tax money back, and had been told by Sauber that that was perfectly all right. See p. ....., *ante*.)

Thus occurred the "dilemma" (R. 233) of "admitting", for purposes of avoiding controversy and obtaining immunity, "Receipts" which in large part were fictitious which necessitated partially fictitious over-ceiling cash "Disbursements" in order to have a balancing accounting entry. The "disbursements" shown on the tabulations were without tax significance because over-ceiling disbursements were not going to be allowed as deductions. Cain The "Disbursements" shown on the tabulations were had been told by Busby and by Sauber, as Treasury Regulations (I. T. 3724, 1945 Cum. Bul. 57) then required, that Shotwell would receive no credit for over-ceiling disbursements but would be taxed on the gross amount of premiums received (R. 252, 257-274). Cain therefore instructed the accountants simply to put in balancing figures for disbursements which he knew were not going to be allowed (R. 2586) but which would make the account balance (R. 233,

2597). It is these disbursement figures, in part admittedly fictitious, but on which no tax deduction was claimed, nor tax consequence expected, that have plagued the case ever since.

When the figures were totalled and put into what became known as the "Disclosure Recapitulation" or "Summary" (longhand form, R. 3090; typewritten copy, R. 3096, also G. Ex. 186, Ex. Vol. I, p. 117), they showed a total "Account Receivable" (from Lubben) of $426,000, less items assertedly uncollected of $48,000, resulting in "Collections" of $378,000. These "Collections" were balanced by "Disbursements" which were computed by deducting the actual $5,898 terminal balance which remained when the transactions were closed and assigning arbitrary amounts to over-ceiling "Disbursements" in the manner Cain had described.

## THE SURRENDER OF MATERIAL TO REVENUE AGENT LIMA.

Revenue Agent Lima was assigned to make the audit of Shotwell on July 30, 1948 (App. 1345). By appointment Lima met Busby at the plant on one of the first days of August. Busby described the nature of the black market transactions and how he had prepared the figures on the "Recapitulation" (App. 1349, 1392, 1401). He gave Lima a copy of the "Recapitulation" or "Summary" which the latter was to take back for discussion with his Group Supervisor, Johnson (R. 189, 1351, 1461). The various supporting work sheets were available and Busby explained how they had been prepared (R. 2810, 2839). Lima spent two or three days (App. 1512) making a "preliminary audit" to determine facts that he thought pertinent to discuss with his supervisor (R. 323, App. 1497, 1500); he said he would do nothing further until he had instructions from the latter (App. 1356). He did discuss the matter with

Johnson, who told him he could allow black market deductions if they could be "substantiated," or if Busby's formula for computing them could be approved (App. 1401, 1460, 1534). Lima was uncertain whether he could handle the case or whether it should be transferred to the "Fraud Squad" (App. 1458) because the Bureau then was blowing "hot and cold" on black market cases (App. 1398-1399).

Lima's supervisor, Johnson, told him "that 'under the way the Bureau policy was at that time, that since we couldn't discover any black market activities on the books of the corporation and since the taxpayer had come to us voluntarily and showed it to us and there was a formula by which it was computed, that the Bureau would accept that as a basis of writing a report and it wasn't necessary to contact * * * the Fraud group.' That was his duty, to find out how this case should be handled" (App. 1533). Lima then did some office work; whether he partially filled out an agent's report or merely made computations is disputed. A short time later Johnson asked Lima to attend a meeting with the "Fraud Squad." The case ultimately was transferred to it and Lima destroyed whatever he had prepared. During the fall Busby pressed Lima as to whether Johnson had made a decision as to how to proceed and was told, according to Lima himself, that he had not (App. 1362) or that it was out of Lima's jurisdiction (App. 1508).

On September 22, 1948, a Special Agent (the same Sam Krane) from the Fraud Squad was assigned to the investigation (R. 3158). The large accounting sheets from which the "Recapitulation" had been made were delivered to him (R. 194). In February 1949, Revenue Agent Mammel replaced Lima (R. 197). Mammel said he was short of help and asked the company to provide clerical assistance. Mr. Busby, or people from his office, were provided to assist Agent Mammel at a cost of $20,000 to Shotwell (R. 200).

In October 1949, Maumel's investigation was still continuing. Petitioners Cain and Sullivan went to Ernest C. Wright, Agent in Charge in Chicago, and complained that the methods being followed by Agent Mammel were disrupting personnel in the office and asked to have the examination speeded up. About a year later the examination was still continuing and they repeated their request. They told Wright that they did not want him to do anything improper but to wind up the investigation and give them an assessment which they would pay. On both occasions Wright told them that if they would not reveal the identity of the recipients of the black market "payouts", the investigation would continue (App. 1001-1007. See also R. 241, 259, 273-4, 3156). (There can be no doubt that Internal Revenue was applying pressure to the Shotwell officials to induce them to turn informer on companies or persons—recipients of Shotwell's black market "payouts"—who might prove to be tax violators. This was shown not only by Agent in Charge Wright's testimony on the reopened hearing but by an official report which Sauber made of a talk he had with Wright in 1950 in which Wright advised him "the case would not be closed until the employees of the Shotwell Manufacturing Company co-operated with their Government and disclosed the names of the individuals to whom these over-the-ceiling payments were made" (R. 3156).)

During the long period between the spring of 1948 and until about March 1, 1952, petitioners were under the belief they had achieved immunity. None of the agents they had importuned to arrive at an assessment ever told them the disclosure would not be honored. About March 1, 1952, Agent Krane told Cain the Treasury had recommended prosecution (R. 236-7).

## THE JURY TRIAL OF 1953.

The disclosure "Recapitulation", its large supporting sheets, and voluminous other data which petitioners had had prepared and surrendered in reliance upon the promises of immunity and in the belief they had achieved it, were introduced against them (Ex. 185, R. 2586, 2588; Ex. 186, R. 2811; Ex. 189A-E, R. 2817; the clearest reproductions of these Exhibits are those attached to the Petition for Certiorari p. 85 ff.) with damning effect. As Government counsel put it on the appeal:

> "* * * the most damning aspect of the [trial] evidence * * * was the corporation's own admission, through Busby's work sheets and summary, that it had received approximately $400,000 in overages from Lubben during a period extending over 1944, 1945 and 1946. (Br. for U. S. in Ct. Apps. on first appeal, p. 46.)
>
> "The structure of the Government's case rests upon two main arches, Lubben's direct testimony as to the payments, and appellants' own admission that they received about $400,000 * * *." (*Id.* p. 57.)

The figure of $400,000 was recited repeatedly to the jury (over objection) as Cain's "own figure" (R. 2580, 2583).

## THE FIRST APPEAL.

The Court of Appeals for the Seventh Circuit in its decision of the first appeal on June 15, 1955 held that "Defendants made a valid, voluntary disclosure, in reliance upon promises of immunity. The evidence thereby obtained by the Government stands on the same footing as an oral or a written confession induced by such a promise. The use of such evidence at the trial was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guaranteed by the Fifth Amendment to the Constitution of the United States." It directed that the evidence so obtained be suppressed and the case be retried.

## THE "REINVESTIGATION" WHICH LED TO SUPREME COURT PROCEEDINGS.

In March 1955, about two months prior to oral argument in the Court of Appeals, undisclosed officials in the Enforcement Division of the National Office of Internal Revenue embraced a "strong suspicion" that the disclosure might not have taken place in March 1948; in late April 1955 inspectors were assigned to a full scale investigation of the matter. (See Stein aff. attached to Mo. to Remand on original proceedings in this Court.) No inkling of this "strong suspicion" or of the re-investigation was given to the Court of Appeals, which was permitted to decide the case without warning that if the decision should be in favor of petitioners the Government might claim the record was "tainted."

The Treasury's so-called "reinvestigation" of the case continued on an unannounced basis during most of the remainder of 1955. In October 1955 the government filed its Petition for Certiorari to review the Court of Appeals decision of June 15, 1955. On December 1, 1955 the Chief Counsel of Internal Revenue Service wrote to the Justice Department saying that investigation had uncovered newly discovered evidence which was "in direct conflict with the testimony of the witnesses Busby and Sauber and the defendant Cain" and which was said to show that "in fact no one on behalf of [Shotwell] furnished the Internal Revenue Service *any information bearing upon or relating to its unreported black market receipts" until July 1948.* (What this supposed evidence "in direct conflict" was remains a mystery for such evidence never was produced.) On December 6, 1955 the Solicitor General wrote to the Clerk of this Court attaching the Chief Counsel's letter and requested the Court to withhold action on the pending petition for certiorari. On December 9 counsel for petitioners

wrote to the Clerk protesting the Government's position. (We assume this correspondence is in the Clerk's files.)

The development of the alleged "new" testimony which ultimately was presented to this Court was a lengthy affair in which the witnesses repeatedly and drastically changed their stories as the investigation proceeded. Commencing in April, 1956 the investigation was headed by Justice Department lawyers working with the aid of a specially empaneled grand jury. The process took so long that in June, 1956 this Court again was requested to withhold action on the certiorari petition so that the witnesses might be further interrogated. Virtually without exception Judge Nordbye has found that the stories the witnesses told the prosecutors (or the new grand jury) at the *beginning* of the re-investigation, rather than the improved versions tendered to this Court, were the truth.

In the presentation of facts as to this endless interrogation, rather than stating the facts in strict chronological order we group them by witnesses because we believe this makes for easier understanding. (The status of the so-called reinvestigation with relation to the contemporary status of the case as it proceeded in this Court may be ascertained by consulting the "Chronology of Litigation," Appendix C hereto.)

**Graflund.**

The importance of Graflund's asserted new testimony can be appreciated only when it is related to the Government's legal contentions of 1956 and 1957: Government counsel, *after* the first Court of Appeals decision, took the legal position that June 21, 1948 marked the so-called "timeliness" date after which Shotwell could not have made a timely voluntary disclosure. This theory was based on the fact that on June 21, 1948, Revenue Agent

Sam Krane of the Chicago Internal Revenue Office, at the request of New York revenue agents who were investigating Lubben, went to the Shotwell plant to obtain from Shotwell's files evidence for use of the New York agents *in their investigation of Lubben.* Since whatever Agent Krane did on that date was a step solely in the investigation of Lubben rather than Shotwell, his actions did not constitute an "initiation of investigation" of the Shotwell case, and counsel's legal theory was unsound. Nevertheless, proceeding upon that legal theory Government counsel asserted to this Court that allegedly "new" evidence would show that "no move was made by [petitioners] to disclose the corporation's unreported black market receipts prior" to this June 21, 1948 occurrence (Br. for U. S., No. 1 O. T. 1957 p. 25; also this Court's opinion in 355 U. S., Notes 13 and 21).

To persuade this Court that the entire fabric of petitioners' contention that the disclosure had been made long prior to June 21, 1948, was rank perjury, the Government argued that Busby *could not* have made the disclosure before that date because he had no knowledge of the black market transactions until after June 21, 1948. Graflund was to establish the latter asserted fact.

As a result of the new hearing Judge Nordbye found (a) that Busby *did* learn of the black market facts from Graflund on a train coming back from New York in January 1948 (App. 1760), and (b) that Busby voluntarily went to the Treasury "*sometime* before" June 21, 1948 (App. 1760-1761.)

The following shows how the "new" and false proof by Graflund tendered to this Court came into existence:

On November 8, 1955, Treasury investigators took a five-hour voice recorded statement from Graflund in Chicago (App. 985, 1096) which covered the case generally and con-

cluded with Graflund saying he felt he owed the Department something because he "could have been indicted with the others" and felt "grateful" (App. 1110-1111). (It was not until February 1957, as we shall see, that Graflund ever made the statement, that he subsequently made in an affidavit for this Court, that he had not revealed the black market facts to Busby in January 1948.)

Sometime between April 4 and May 10, 1956, the prosecutors interviewed Graflund at length, and on May 10, 1956, Graflund gave them a 58 page (App. 986) recorded statement in which he repeatedly told of his trip with Busby to Lubben in New York in early January 1948; he described his revelations to Busby vividly, said that when he revealed the facts to Busby he "was not sparing the horses" and expressed the opinion that the over-ceiling transactions might be about $100,000; he said also that sometime in January 1948 Huebner procured some records from Lubben and that Huebner acquainted Busby with them prior to the time they were worked with at the Belden-Stratford Hotel (App. 1125-1130). (The contradiction between this statement and what Graflund ultimately put in his affidavit to this Court is complete.)

Graflund was not taken before the grand jury until late August 1956. Before he was taken to the jury he was brought into an extensive joint interrogation with Huebner, which resulted in a 21 page typewritten memorandum (App. 555).

On August 28, 29 and 30 Graflund testified before the grand jury (App. 1151) and repeatedly swore that he fully informed Busby of the black market dealings in the club car of the 20th Century Limited returning from New York to Chicago in early January 1948 (App. 1198-1204). He made no claim that Busby did not know of the black market transactions until late June or early July 1948 (App. 1138). His testimony not only fully corroborated Busby's original

rather terse testimony that he had thus learned of the black market transactions (R. 170, 211-212, 1827, 1829) which led him to advise that disclosure be made, but went beyond and elaborated upon it with convincing details (App. 1198-1204).

About three weeks later, September 19, 1956, prosecutor Russo executed the principal affidavit attached to the Motion to Remand here. Supposedly, it was based upon what the witnesses had told him, but it did not mention that Graflund had been interviewed repeatedly and fully corroborated Busby's original testimony as to how, and approximately when, the latter had learned of the black market transactions; nor did Russo's affidavit indicate that Graflund supported Busby's testimony that during the spring of 1948 Graflund had worked with Huebner in an effort to reconcile and reconstruct the Lubben account (App. 1165-1166). On the contrary, the Russo affidavit contained a sweeping and unqualified assertion that:

> "From statements of fact within the personal knowledge of witnesses interviewed and interrogated by me, and from facts and circumstances already in the record, it appears that prior to June 21, 1948 * * * no disclosure, voluntary or otherwise, had been made by Busby and Cain to Sauber or to any other official or employee of the Internal Revenue Service."

Graflund apparently was left alone during the closing months of 1956; the year ended with Graflund still corroborating the genesis of the disclosure *i. e.*, his revelation of the facts to Busby in January, 1948 and the latter's advice to disclose. Meantime on December 24 petitioners' Answer to the Amended Motion to Remand, strongly contesting the sufficiency of the showing, was filed here.

In this posture of the case the prosecutors had another go with Graflund on February 3, 1957. It apparently was unsuccessful for no memoranda was made of it (App.

1205). The prosecutors then brought Lubben to Chicago from Puerto Rico (App. 946) and on the 17th of February a conference was arranged which brought together the prosecutors, Lubben, Graflund and Huebner (App. 1205). Three days later, February 20, 1957, Graflund was again taken before the grand jury. He now recanted all of his previous testimony that he had informed Busby of the black market dealings in January 1948 and for the first time in recorded form gave the story that Busby appeared to know nothing about them until Graflund went to the latter's house (so he claimed) in late June 1948. He explained this switch to the grand jury as follows:

> "A. Well, with subsequent conference with Mr. Krafie of the Internal Revenue and Mr. Russo and Mr. McNelis, I saw vouchers from Mr.—no that is not the one, that is another point.
>
> "*In our conversation* it came to my mind, this trip of mine to Mr. Busby's home [in June] about which I had completely forgotten * * *" (App. 1287).

The "conversation" with the prosecutors and investigators that Graflund referred to necessarily was his February 3 or February 17 interrogation, because he had not been in touch with them at any time after his August 30, 1956 appearance before the grand jury at which he repeatedly had sworn he informed Busby of the black market dealings on the train in January 1948.

Although this conversion of Graflund to a radically different version was the capstone to the prosecutors' case, this asserted fact was not reported to this Court for some six months. On August 17, 1957, an affidavit which said Busby appeared not to know of the black market transactions until after June 21, 1948 was prepared for Graflund's signature and he executed it (App. 1120-1125). Two days later the affidavit was sent to this Court by means of a simple transmittal letter to the Clerk. Neither the affidavit nor

the transmittal letter gave the Court any knowledge whatsoever that the affidavit actually was a recantation of a solemn statement Graflund had given in May 1956 (App. 1125-8) and of sworn grand jury testimony given at length in August 1956 in which Graflund had pointed out, *as Judge Nordbye has now found the fact to be* (App. 1760), that Graflund had revealed the facts to Busby at length in January 1948.

The vital importance of the affidavit is clear from what appears in this Court's opinion in 355 U. S. commencing at page 239, and is further clear from the importance attached to the affidavit by footnote 13 thereto.

**Lima.**

Revenue Agent Lima was the agent who actually commenced the investigation of Shotwell pursuant to the disclosure. No affidavit from him was filed with this Court in support of the Motion to Remand. Instead, representations were made in the prosecutors' brief which was filed in August 1957 that if the case was remanded, Lima would testify that sometime in 1948 he had prepared a Revenue Agent's report showing a tax deficiency of about $20,000 which he subsequently destroyed at his supervisor's direction (355 U. S. 233, 240, n. 15). Lima testified as a Government witness at the original suppression hearing in 1952 (R. 319, ff.) and on the jury trial in 1953 (R. 2804, ff.), and gave no testimony of this nature at all.

On August 10, 1955, after the re-investigation of the Shotwell case had been in full swing for about four months, Lima, who had been transferred from Chicago to the Tampa, Florida, Internal Revenue Office, was brought to Washington for extensive interrogation. On that date he gave a 29 page sworn statement (App. 1419) in which he told nothing materially different from the brief testimony

he had given on the original proceedings or that was in any way inconsistent with the Court of Appeals decision. Specifically, at this August 10, 1955 interrogation, Lima said nothing about preparing a Revenue Agent's report or making a $20,000 tax estimate or about obtaining a 870 Form for use in closing the case out (App. 1418-20).

In July 1956 Lima was brought to Chicago from Tampa and after considerable private interrogation by the prosecutors was taken before the grand jury on July 26. Although interrogated at length, he still gave no testimony about any settlement at any amount whatsoever, about computing a tax at approximately $20,000, or making out, either partially or completely, a Revenue Agent's report (App. 1437-1441).

The prosecutors were not satisfied. In October 1956 Lima was brought back to Chicago. He was subjected to considerable interrogation and became "scared" (App. 1444). He was then subjected to a lie detector test. Under the lie detector he said he did *not* recommend that the case be settled for $20,000; that he did *not* submit or prepare a revenue agent's report, and didn't know whether a Form 870 was prepared. He told the operator he had been interrogated so much that he had trouble recalling what was in his mind and what he had heard or what had been asserted to him during the lengthy investigation (App. 1445-1451, 1455, 1456, 1478). After further interrogation (App. 1453) and being told that the lie detector test was inconclusive, Lima was again taken before the grand jury and still gave no evidence as to preparing a report, a $20,000 tax, or anything about a Form 870 (App. 1465). Moreover, he told the jury that he had formed an impression about August 1, 1948 that Busby had learned of Shotwell's black market problems at least from 3 to 5 months prior to the August 1948 date (App. 1387). At this time, October, 1956, there was nothing of material importance

in Lima's testimony that contradicted anything anyone had testified to originally.

But Lima was not left alone:

On December 19, 1956, he was brought to Washington for further interrogation. He gave an additional 32 page sworn statement (App. 989). In this he began to change his story, for he now sometimes talked about having filled out a Revenue Agent's report (App. 1483), although at other times he said he had merely made "computations" of what a tax might be (App. 1495). He made no mention of having either procured or having made out a Form 870 (App. 1478-9) as he subsequently was to testify on the remanded hearing.

On January 22, 1957 Lima was brought to Chicago and subjected to still further interrogation (App. 1501-3). On the following day he was taken before the grand jury and swore he had filled in the formal parts of a revenue agent's report in the summer of 1948 (App. 1505), had computed a tax of approximately $20,000 (App. 1504), but was hazy and did not remember whether he had obtained a Form 870 (App. 1479). He had no knowledge that the Shotwell tax case was fixed and had heard nothing of any money being passed to anyone (App. 1513). He explained his recantations and changes to the jury as follows: "* * * When I testified the first time I thought I knew just a little about this case, and, by golly, with all these conferences and interviews and refresher courses, it is amazing how much I know about it today" (App. 1382).

"Right after" Lima gave this testimony Prosecutor Russo promised to help him if he got in any trouble (App. 1486-7).

**Huebner.**

The prosecutors' contact with then defendant Huebner appears to have first been made in late March or early April 1956. The new grand jury was sworn in on April 9. There is some uncertainty as to whether Huebner met with the Government attorneys and investigators before the grand jury began sitting or immediately afterward (App. 714), but in some unknown manner contact was established and continued from thence on. In April or May 1956, Huebner secretly, and without discharging his counsel of record, authorized another Chicago lawyer to continue negotiations with the Government (App. 711), and from this time on Huebner "cooperated."

On July 22 and July 24, 1956, Huebner gave the prosecutors lengthy tape recorded conferences from which they prepared a 21-page memorandum on July 28 (App. 555). In this Huebner stated that "overages" (black market premiums on candy) did not commence at the rate of 10¢ a pound, as Lubben had claimed, but at 5¢ a pound, and, quite contrary to Lubben's account, he said there were certain goods that did not bear any overages whatsoever (App. 750; 952); that Lubben's records indicated he was "trying to lay off money on somebody." (App. 795-6; 791.) (Before Judge Nordbye Huebner doubled the rate of "overage" to 10¢ and his recital of alleged payments necessarily was based upon Lubben's falsified so-called "records.")

Huebner was interrogated every few days during late July and August 1956. On August 21 he was taken before the grand jury, still swearing that overages started at the rate of 5¢ a pound (App. 947-952).

Private interrogation still continued. A lengthy session took place on August 26 (App. 555).

On September 17 Huebner was interrogated with respect to a possible meeting in the Chicago Athletic Club with Sullivan and one Urban in July 1948 at which purchase and destruction of Lubben's records supposedly was discussed. Huebner didn't recall ever being in the Chicago Athletic Club with Urban (App. 854).

Nevertheless, on the following day, September 19, 1956, Prosecutor Russo executed the principal affidavit for attachment to the Government's motion to remand which we have alluded to in our statement as to Gratlund. In that affidavit the prosecutor recited by hearsay that one Edwin T. Urban, an officer of another candy company which had had black market dealings with Lubben, had informed the prosecutor that in July 1948, at Huebner's invitation, he had met and had lunch with him and petitioner Sullivan at the Chicago Athletic Club and that there was discussed a purchase of Lubben's companies for the purpose of acquiring and destroying Lubben's records.[15] Mr. Russo did not tell the Court that he had already had Huebner before the grand jury where he gave no such testimony and that Huebner had given him a memorandum denying what Russo said Urban had said.

The prosecutors were not content with Huebner's denial of any meeting at the Chicago Athletic Club to discuss purchase of Lubben's companies for the purpose of obtaining his records and went at him again on September 26, 1956. But Huebner still "recalled nothing" of any such occurrence (App. 854). However, by December 19, 1956, Huebner had "remembered" and on that day signed the affidavit which was attached to the supplement to motion to remand filed in this Court on January 9, 1957, in which he parroted the Russo affidavit, saying:

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15. It may be noted that on the Supplemental hearing Urban did not testify. The prosecutors produced a doctor's statement that he was too ill so to do (App. 1190).

"Early in July 1948, on Sullivan's instructions, I arranged a meeting at the Chicago Athletic Club with one Edward Urban of Close and Company, which also had black market transactions with Lubben. At the meeting Sullivan discussed with Urban the possibility of forming a group to purchase Lubben's business interests in order that Lubben's books and records could be obtained. No mention of voluntary disclosure was made at the meeting."

## HUEBNER'S SECRECY.

It is to be noted that the motion to remand was filed in both an original form on October 15, 1956 and in an amended form on November 15 for the purpose of correcting certain inaccuracies in the original form that are not now material. Counsel for petitioners had been informed almost simultaneously with the filing of the original that it was to be changed and took no steps to prepare an answer until the amended document came in. On November 18, 1956, petitioner Cain suffered a severe heart attack (App. 125); it was impossible for him to aid in preparation of a response to the amended motion. On the following day, November 19, Huebner's counsel of record called Huebner; told him the motion to remand was about the most important thing in his life and begged him to come to the office and discuss it; that Russo had filed an affidavit about Urban and a plan to buy out Lubben and was trying to make it appear that nobody did anything about a disclosure until sometime in July; that the Russo affidavit was vague and hearsay but had to be answered and that Huebner was the one that had to tell counsel about it because there wasn't a chance counsel could talk seriously with Cain before the answer was due about the 22nd of December. Huebner replied he was too busy making candy (for another candy manufacturer); that he was in the Christmas business

and soon would be in the Valentine business. His counsel replied (profanely) that this was nonsense (App. 709-711). The conversation was so startling that his counsel of record made a memoranda of it.

Huebner's various conferences with the prosecutors narrated above and his grand jury testimony had all been given secretly and without the knowl dge of his counsel of record. Huebner asserted on the new hearing that never once during the interval of some 7 or 8 months until his masquerade was discovered had the prosecutors told him that they could not talk with him behind the back of his attorney of record and that Huebner should discharge him (App. 718), nor that if what he was doing was honorable and truthful he didn't have to secrete it from anyone but could come out and tell everyone he was being an honest man (App. 743, App. 746).

## THE EFFECT OF THE INTERROGATIONS UPON THE MINDS OF WITNESSES.

As the chronology attached hereto and the foregoing portions of this statement show:

(a) Revenue Agent Lima was interrogated at least nine times (and in lengthy sessions) between 1955 and 1957. At the time he was subjected to the lie detector test he said he had been talked to so much that he had trouble recalling what was actually true and what he had learned from other sources (App. 1450-1, 1955-6); he told the operator he was "positive" he had not prepared a Revenue Agent's report (App. 1450); he asked the operator, "How I could answer a question *properly* [*sic*] when I had heard different stories about what had happened" (App. 1456). He was told it was possible he might be indicted (App. 1484,

1523-4) and that he might be fired (App. 153).[16] He first denied that there was any talk as to whether the Treasury's attitude toward him might be influenced by whether he "co-operated" but he then was asked:

> "Q. Nobody ever said to you at any time 'Mr. Lima or, Joe, co-operate with us and let's see how this thing pans out,' or 'Co-operate with us, and maybe we can make a recommendation for you'; nobody ever said anything like that to you, is that right?"

It was necessary to demand an answer three times before Lima admitted:

> "A. Well, I have been told that if I ever got in trouble they would help me out possibly or assist me if they could.
>
> "Q. All right who told you that?
>
> "A. Mr. Russo" (App. 1485-7).

When Lima was finally taken before the Grand Jury for the *third* time in February 1957 and told the story that the Government's brief in this Court asserted he would tell if the case were remanded, he explained his numerous recantations as follows:

> "* * * when I testified the first time [before the Grand Jury] I thought I knew just a little about this case and, by golly, with all these *conferences* and *interviews* and *refresher courses*, it is amazing how much I know about it *today*" (App. 1382).

(b) Huebner was interviewed "many, many times" (App. 715), with his testimony gradually coming into accord with the theories of the Motion to Remand. On the reopened hearing he was so repeatedly impeached and con-

16. Lima was shown to be a middle-aged man of mediocre ability who had twice failed to pass a certified public accountant's examination. He is married and has children. Loss of his job obviously would be a disaster. Cf. *N. L. R. B.* v. *Griswold Mfg. Co.*, 3 Cir., 106 F. 2d 713, 722: "* * * the employee is sensitive and responsive to even the most subtle expression on the part of his employer, whose good will is so necessary * * *."

tradicted by his own prior recorded statements, some under oath, some not, that he could explain his answers only by saying at least 22 times:

"My memory was refreshed" (App. 701, 720, 721, 750, 759, 762, 771, 772, 778, 785, 823, 855, 858, 900, 931, 952, 958, 970).

He once said (quite descriptively) that he had "*rehashed* [his] memory again" (App. 750).

Again:

> "• • • when I rechecked my memory *with the Government* I found out I was wrong," (App. 846).

and

> "Since then I have changed my mind," (App. 897).

and, when he "forgot" something he previously had been able to recall,

> "At this time, my recollection is that I don't recall" (App. 742).

Because Huebner could not, on the reopened hearing, testify to facts he honestly recalled, *it was necessary for him virtually to memorize his testimony.* The questions and answers were written out in advance of the hearing. On the hearing Prosecutor Russo read the questions from a notebook while Huebner parroted back the answers in a monotone. On cross he was asked:

> "Q. How many different times have you gone over these questions and answers?
>
> "A. I can't say. I went over the questions and answers maybe five, six, seven, eight times. I don't know exactly.
>
> "Q. Before you testified this time?
>
> "A. That is right." (App. 823; see also App. 938).[17]

17. Typical of much of the record is the following, not as detailed as some "explanations" of radically changed, important

(c) Graflund has been discussed *ante* pages 29-34. In addition to the startling change in Graflund's testimony there discussed there were other equally radical changes which are not described in the District Court's opinion, which merely admitted that there were "glaring inconsistencies and contradictions which appear in the testimony of Huebner, Graflund and Lubben in light of their prior statements and their testimony before the grand jury" (App. 1769).

Reference to some of Graflund's variations is illuminative of what can happen when prosecutors are given an opportunity to pursue witnesses in an effort to salvage a conviction. Some of these changes were on matters which we believe were not material to the remanded issue as to disclosure. They are material however to an inquiry as to whether proper processes of criminal law were abused and whether Graflund was "brain washed" into nonsensical stories.

In the process of the reinvestigation Graflund finally got to the point where he was willing to tip his whole 1953 trial testimony, and that of many other witnesses, upside down and say that no over-ceiling payments from Lubben were received openly by Shotwell until after January 31, 1946 (App. 1029). Such testimony, if believed, would support a claim that until that date everything that Lubben paid went into the personal pockets of Huebner, Cain and Sullivan. The fact was that on the jury trial witnesses

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testimony were, but illuminative, taken from the cross-examination of Huebner:

"Q. After you had four or five or six conferences with the Government agents [in the summer of 1956], your memory was still that you didn't get any money until in September or October of 1945 and you didn't know how much it was then? [He testified before Judge Nordbye that he got money months earlier.]

"A. At that time, that is correct.

"Q. After you conferred with the Government agen some more, your memory changed?

"A. That is correct." (App. 772)

Roeser (R. 1703-9), Mrs. Morrill (R. 779-782), Cain (R. 2546, ff.), and Graflund had testified that over-ceiling payments from Lubben were openly received at the Shotwell plant commencing in the fall of 1945; the money was placed in a cash box at the Shotwell plant from which withdrawals were made for premium payments on raw corn. Graflund had testified to this procedure repeatedly in 1953 (R. 1780-1, 1740, 1783, 1787, 1788, 1789). When the reinvestigation of the case started in 1955 Graflund told Government agents in November of that year (App. 1119), and again in August 1956 (App. 1140-41) that the "corn box" was opened in the fall of 1945; before the grand jury in August 1956 he testified repeatedly that in the fall of 1945 he learned money was coming in from Lubben for corn (App. 1206-1210); further, that excess money beyond that suitable for retention at the plant was kept in a safe deposit vault at the City National Bank for a period of about nine months from the fall of 1945 through the first six months of 1946 (App. 1213); that money went into the corn box at the plant from September 1945 through June 1946 (App. 1219-1220). All of this was to be swept aside.

During his February 17, 1957, interrogation, at which Lubben was present, the prosecutors showed Graflund certain checks which Lubben had cashed in Chicago in November of 1946, "and Mr. Lubben satisfied me *that* had to be the time and not November of '45" (App. 1291), yet he wound up testifying before Judge Nordbye on direct examination on the remanded proceeding in December 1958 that corn transactions did not begin until late January 1946 (App. 1029), and that he got an unstated sum of money from Lubben not, as Lubben had "satisfied" him, in *November 1946* but some nine months earlier, in February or March 1946 (App. 1035). One difficulty with this testimony (apart from the recantations and switches involved) is that whatever Lubben may have persuaded Graflund of when he aided the prosecutors in the inter-

rogation of February 17, 1957, Lubben nevertheless had sworn on the trial in 1953 that all his asserted payments in February and March 1946 were to Huebner and not to Graflund. At the trial in 1953 Lubben did not claim he made any payment whatsoever to Graflund personally until October or November 1946, and that asserted incident Graflund had denied (R. 1789).

But even this is not the end of the story: On February 20, 1957, immediately after Graflund had been vouched by Lubben in the February 17, 1957 interrogation, Graflund swore to the grand jury that Lubben paid him $15,000 in November 1946 and that it went into the cash box (App. 1290-1291). Someone realized that such a story could not possibly hold up because there was far too much testimony, including Graflund's, that the cash box had been closed some four months before that date. So in December 1958 Graflund switched again and told Judge Nordbye he got an unstated amount of money in February or March 1946. Thus the witness swore three ways: first, repeatedly on the trial, and repeatedly before the grand jury in August 1956, that he knew all about corn transactions in the fall of 1945 and got one payment from Lubben at that time; second, before the grand jury in February 1957 that he got one payment of $15,000 in November of 1946; third, upon the remanded hearing, that he still got only one payment but it was in February or March of 1946 and he didn't know how much it was. The District Court passed this entire matter after recognizing that there were "glaring inconsistencies and contradictions" in the testimony (App. 1768-1769), with the observation that it was not important to determine on the remanded hearing the exact period of the existence of the corn box or the exact amount of Lubben's money which was used to purchase raw corn (App. 1763).

Two other pieces of Graflund's testimony deserve atten-

tion. Again we do not believe they were material to the issue this Court remanded to the District Court and this Court cannot resolve the fact questions; nevertheless are illustrative of the dangers of ceaseless interrogations and "refresher" courses by prosecutors:

Graflund testified on the 1953 jury trial that he got surplus cash money out of the bank vault only on Huebner's instructions and always took it directly to the plant (R. 1746, App. 1149-1150). However, at the new hearing he testified to an asserted episode of meeting petitioner Cain at the bank, counting out $5,000 and giving it to him for some purpose of straightening out sugar allocations. He was unable to give any reason why he had not mentioned this asserted dramatic episode before (App. 1150). His failure to assert such an event in 1953 is inexplicable in view of the fact that the remanded hearing developed that even in 1953 Graflund was co-operating with the Government. Cain swears nothing of the kind occurred (App. 1607).

Again, on the remanded hearing a desperate effort was made to show that some of the Lubben money was physically handled by petitioner Sullivan. Graflund testified before the grand jury in August 1956 that in *late 1945* he took Sullivan to the bank vault so that Sullivan could simply count—not take out—$10,000 in currency (App. 1300-1301). Such testimony did not fit a new theory the prosecutors had developed that none of the cash was utilized by Shotwell for corn until after February 1946, nor would it jibe with bank records which the prosecutors had had in their possession since 1952 (App. 1340-1341) showing that no person not authorized to sign for entry to the bank vault (and Sullivan was not) had had entry to it in the last nine months of 1945. The prosecutors then put the bank record before Graflund, which showed that a person not authorized to sign had been in the vault with Graflund on January 31,

1946, and Graflund promptly swore to the grand jury that the person was Sullivan (App. 1303).

On cross-examination before Judge Nordbye Graflund agreed that the bank record faced him with the choice either of abandoning entirely his assertion that he took Sullivan into the bank vault or of placing that asserted episode at January 31, 1946. He chose the latter alternative (App. 1306), despite the fact that he had testified that at that date there was no cash on hand whatsoever for Sullivan to count, and that he had had to draw checks on that day for currency so that he could get cash money for black market purchases (App. 1306). The true fact proved to be that the person who had been in the bank vault with Graflund on January 31, 1946 was R. J. Metzger, an auditor, who went there in connection with the annual audit of the company. The development of that clinching evidence on the remanded proceeding of course required great effort (App. 1321, 1323, 1342, 1375, 1545-1548), and in the process the prosecutors tried to thwart every effort to have the full facts developed by meaningful cross-examination (App. 1547).

## THE NEW INDICTMENT FAILED TO ALLEGE THE PERJURY CHARGED HERE.

On February 25, 1957 this Court granted the Government's petition for certiorari. Two days later the new grand jury brought in a lengthy indictment against petitioners charging conspiracy (copy is an Appendix to Brief for Respondents when case first here, No. 1 O. T. 1957). Although the Government was asserting to this Court that the testimony in this case as to the making of a voluntary disclosure reeked with perjury by describing an entire series of disclosure events that had not taken place at all, *the grand jury before which the evidence was developed made no such accusation whatsoever.*

## THE PROCEEDINGS IN THIS COURT.

This Court's ultimate order of remand was based almost entirely on the Supplement to the Motion to Remand which was based on the Huebner affidavit, the Graffund affidavit filed after certiorari had been granted, and the representations in the brief for the United States as to what Lima would testify. From each of those documents, as we have seen, determinative facts helpful to petitioners, and testified to under oath by witnesses wholly beyond the control of petitioners, were withheld from this Court. All material reflecting on the credibility of the affiants and showing how they repeatedly had changed, switched and recanted their stories, was suppressed. Nor did any document filed with the Court inform it that important, responsible witnesses to the disclosure events who had testified on the original proceedings, Roeser (R. 2459), Morrill (R. 746), Sproull (R. 2099) and Busby himself had been examined intensively before the Grand Jury and had not changed their 1952-3 testimony.

## THE NEW OR SUPPLEMENTAL HEARING IN THE DISTRICT COURT.

Inasmuch as the supplemental hearing ordered by this Court was a novel one, counsel were in doubt as to what the fact issues would be. This Court's opinion of December 16, 1957, had directed that the additional evidence should be confined to the suppression issue, and directed the District Court to make new findings on that issue in the light of the further evidence *and* "the entire existing record" (see 355 U. S. at 245). Just what parts of the "entire record" would be relied on was doubtful.

Counsel for petitioners were of the view that since this Court had listed five subsidiary issues that concerned it,

and had noted the representations as to Lima's testimony in its footnote 15, that in general the hearings should be confined to those charges. Moreover, they were of the view that the Government, in essence, had moved to set aside a prior judgment on the ground of asserted fraud, and had a heavy burden of proof in that regard.[18] Attempts by motions for particulars (App. 145), to limit subpoenas that had been issued (App. 273), to obtain documents and statements (App. 119-124), and to obtain some definition or limitation of the issues prior to the hearing were unavailing (App. 263, 264, 422, 425).

The new hearing, rather than being confined to examination of the charge that no disclosure had been made in early 1948, was permitted, over repeated objections (App. 195-6, 208, 263, 273-80, 303, 391-471, 543-7, 567, 573, 1028, 1781) to cover the entire alleged course of dealing between Lubben and Shotwell throughout 1944-5-6.[18] This was the merits of the case, went far beyond this Court's limited remandment and embraced fields which, if proper at all under the indictment, were only for a jury in a new trial. The prosecution endeavored to show that some of Lubben's black-market payments to Shotwell were not disbursed by it for corn but went to Cain and Sullivan personally. Whether whatever money actually was received was spent for corn or was partially disbursed as the prosecution claimed, and Cain (R. 262) and Sullivan deny (R. 2638), as

18. Shortly after the order of remand the District Court expressed the remanded issue as follows:

> "Of course, the ultimate fact is, I take it, whether the voluntary disclosure was made in July or August of 1948 or whether it was made in March, 1948. That is, after all, the ultimate issue, is it not?" (App. 200).

However, the District Court did not adhere to that view. The prosecutors took the position that they could question Huebner not merely as to when disclosure had been made but

> "• • • *about everything that happened in his transactions with Lubben*" in 1944, 1945 and 1946 (App. 572).

The trial court sustained that position and the hearing on remand became a virtual re-trial of the case on the merits.

so-called "constructive dividends" would make no difference in *Shotwell's* taxes, for neither type of expenditure was recognized as deductible in 1948. But in substance, as the District Court's discursive opinion indicates, on the reopened hearing Cain and Sullivan were put through a bench trial on an alleged crime for which they had not been indicted—personal tax evasion—and in effect found guilty.

**LUBBEN PERJURY BEFORE ORIGINAL JURY.**

In opening up the entire case the Government showed in 1958 that the original 1953 jury convictions had been obtained by perjury by its star witness, Lubben, on whose testimony the jury verdicts depended.

The District Court in its 1959 opinion did not use the word "perjury" in describing Lubben's 1953 testimony; it used the more polite term, "exaggerated"; but the "exaggeration" was too great to be inadvertent. The District Court, in 1959, found that Lubben's testimony to the 1953 jury was not, as the District Court erroneously then had found "sincere" and "truthful" (R. 3018), but was "exaggerated" (App. 1758), necessarily to the extent of well above 100 thousand dollars on the gross amount involved.

It thus is now undisputed that petitioners were convicted by the jury in 1953 on materially false evidence—evidence which the District Court specifically found that the jury in 1953 believed was true (R. 3073).

On the Petition for Certiorari and the Brief in Opposition on this review, a dispute developed as to the probable *amount* of Lubben's falsifications to the trial jury. We asserted that Judge Nordbye's new findings, fairly construed, admitted that Lubben falsified, *i. e.*, "exaggerated", to the extent of at least $132,000. Government counsel disputed the correctness of that figure. We assert that, in fact, it should be higher. What the precise figure

should be is of course a question for a jury but two items alone show the severity of the question:

Huebner testified on the new hearing that one line of goods, chocolate covered nuts, which Lubben had testified carried a premium of 10¢ a pound, actually bore no overage whatsoever. This item alone amounts to approximately $40,000 (App. 797-800). Huebner also testified that Lubben lied with respect to an alleged item of $49,000 which he claimed he paid to Graflund (App. 809).

Lubben's testimony on the original trial had, in substance, been based on, or refreshed by, his asserted books and records. On the new hearing, Huebner, testifying as a witness vouched for by the Government, admitted that one Daniel Tobias, who at one time had been an accountant for Lubben, and thereafter became an employee of the Internal Revenue Service in New York, admitted, while an Internal Revenue Service employee, that Lubben's books had been altered so that items that had been charged to different companies, were charged to Shotwell; Tobias said he had worked with Lubben in altering the books (App. 969). This evidence came out early in the 1958 hearing. Although the Government knew that Tobias is still alive and maintains offices in New York City (App. 1550), he was not called to deny this admission.

We have previously shown in this Statement that on at least three separate occasions prior to his appearance before the 1956 Grand Jury, Huebner contradicted Lubben's testimony by saying that premiums began at the rate of 5¢ a pound and later were raised to 10¢. Huebner testified to 5¢ when he was before the Grand Jury on October 21, 1956 (App. 947-952). The difference between 5¢ and 10¢ on the tonnage involved was important and would have made it impossible, at least during the early transactions, for Lubben's calculations of overages to agree with Huebner's. By the time the hearing was held before Judge

Nordbye, Huebner had come around to the 10¢ figure. The only explanation offered for the attempted erasure of this vital contradiction was as follows:

> "Q. When did you arrive at this notion you expressed that it was 10¢ throughout?
>
> "A. Through all the different meetings I had.
>
> "Q. When please.
>
> "A. I did not know just exactly when. I had a meeting with Lubben, and I had a meeting with Mr. Graflund at different times, and also with different sheets Lubben had and the Government had that I seen to refresh my memory." (App. 952-955).

**THE FINDINGS OF THE DISTRICT COURT ON REMAND.**

The "order" (App. 1754), actually opinion, of the District Court upon the remand is so argumentative as to defy succinct analysis.

The theories the District Court arrived at upon the remanded proceeding were:

*First*, that the proceeding was but a continuation of the hearing on the 1952 motion to suppress evidence, with the burden of proof resting on petitioners (App. 1757). *Second*, that although the disclosure was made, "material facts were not made known to the Government" because petitioners "failed to reveal that substantial amounts of unreported income were diverted into the pockets of the officials of the company," and that the foregoing necessarily was the jury's conclusion in 1952 (App. 1766-1767). Judge Nordbye failed to give any weight to the fact that whatever the jury decided in 1952 was upon materially false, "exaggerated" (App. 1758) testimony of the Government's star witness, Lubben, and upon admittedly "doctored" records. *Third*, that "fraud permeated the showing made * * * in the original suppression hearing, as well as in the trial and in the supplemental hearing * * *. A dishonest and

false disclosure cannot be held to be a timely voluntary disclosure" (App. 1770).

The foregoing sweeping conclusions avoided the carefully enumerated points this Court wished investigated and shroud *the fact that the District Court failed to find any perjury was given as to the disclosure*. The District Court could not have documented any supposed perjury or fraud in the supplemental hearing because petitioners made but a brief affirmative showing thereon, consisting principally of Horgan's evidence as to his conversation in the hospital with Sullivan; *which the Court accepted at true;* the bank officer's testimony which showed that Sullivan could not possibly have entered the bank vault to count money with Graflund, (as Graflund falsely claimed in 1958) *which the Court accepted as true;* and the Chicago Athletic Club records and testimony that Sullivan did not rent a safety deposit box there, *which the Court accepted as true*. These things, (and many others), convincing of petitioners' good faith found no place in the District Court's opinion.

In brief, unable to find that the petitioners ever deceived the courts as to what they did in making the disclosure, the District Court nevertheless damned them by blurring together his views as to tax law, as to the merits of the case for which petitioners were indicted (corporate tax evasion), and as to the merits of asserted cases for which petitioners never have been indicted (personal tax evasion). This process stripped petitioners of their rights to indictments for any supposed crime for which they were to be tried and to jury trials on any such indictments; nor was it responsive to the mandate of this Court which fundamentally authorized the District Court only to find out whether the original decision of the Court of Appeals directing suppression of evidence had been procured by a perjurious

fraud upon the courts in the form of a claim of a voluntary disclosure which in fact never had been made.

On the specific, subsidiary issues enumerated in this Court's opinion (pp. 239, 240 of 355 U. S.), Judge Nordbye responded as follows: (1) He found that the Graflund charge that he had not revealed the over-ceiling transaction to Busby until late June 1948 was false; that Graflund actually had revealed the facts to Busby in January 1948 (App. 1760). (2) As to the charge that at no time prior to July 1948 were Graflund and Huebner led to believe that Shotwell had disclosed the facts to the Treasury, no specific finding was made. Certainly, therefore, the Court did not find that this charge was proved. Moreover, the evidence showed that as early as February 1948 Huebner, in Graflund's presence, was advising others that Shotwell might have to disclose and was being beseeched by them to prevent it (App. 967, 1169-71). (3) As to Huebner's charge that in July 1948 he was "given to understand" that the date of the disclosure "would be set at June 15, 1948," the District Court inconsistently found (a) that Huebner apparently "gathered" June 15, 1948 was to be fixed as a fictional date for a fictional disclosure (App. 1764), while simultaneously finding (b) that the disclosure in fact had been made not only prior to June 21, 1948, but necessarily sometime prior to June 4, 1948, the date on which Sullivan importuned Horgan to get the investigation pursuant to the disclosure under way (App. 1761). (4) As to the charge that no work was done to assemble records or data for the purpose of making a disclosure prior to late June 1948, the Court made the backhanded finding that work in fact was done between January and July (App. 1762) but that no "concerted" effort was made until sometime in July. Essentially, then, the opinion finds that Graflund's and Huebner's affidavits that no work was done to assemble data prior to the middle of 1948 was per-

jury. (5) As to Huebner's claim that in July and August 1948 he gave Cain $10,000 "to fix the tax difficulty," Judge Nordbye found he could not make a "definitive" finding. (6) As to Huebner's claim that he had not been asked to testify originally in the District Court because he would not lie on the stand, Judge Nordbye makes no finding whatsoever, and for the reason that the prosecutors made no attempt whatsoever to support that malevolent charge on the remanded hearing.

Although the District Court's opinion abounds with denunciations of petitioners for fraud, analysis demonstrates that the believed fraud the District Court talks about is what he believes to have been the basic tax fraud. Whether such fraud had existed was a question for a jury in a fair trial. Basically the Court made its private determination as to what it believed true amended returns of the Shotwell Company for 1945 and 1946 should have been, what it believed true amended returns of Cain, Sullivan and Huebner should have been for those years, and then found that some of the representations made after the disclosure did not conform with those views. In the process the District Court overlooked entirely that it was, in effect, convicting petitioners of crimes they had not been indicted for, and was doing so by relying on evidence which had been extracted from petitioners by promising them immunity.

The serious constitutional questions involved are ignored in the Court's opinion.

## FACTS AS TO THE INVALIDITY OF JURY SELECTION PROCEDURES.

When the new Grand Jury returned its indictment of February 27, 1957, the defendants in that new case filed motions challenging the composition of that Jury. A hearing was held in that case in June, 1957, before Judge

Barnes. (The S. Appendix here). That evidence showed that the methods used in selecting potential jurors had been in effect prior to the selection of the jurors in *this* case.

Promptly after obtaining that new evidence, defendants moved before the summer emergency Judge (J. Sam Perry) for leave to withdraw their pleas of not guilty for the purpose of filing an amendment to their motion to dismiss the indictment herein because of illegality of the jury. That motion was denied on the ground that the case was in the Supreme Court (App. 16-17). Defendants then moved for leave to take the deposition of Harry D. Crooks, the Jury Commissioner. The affidavit in support showed that Mr Crooks was in poor health and might be unavailable to testify on a future motion. This motion was continued by Judge Campbell for hearing before whatever Judge became regularly assigned to the case (App. 22).

After this Court's decision defendants, on March 17, 1958, renewed the matter (App. 111-114).

At the hearing on the motions it was stipulated that Judge Nordbye should consider the testimony taken before Judge Barnes in the other case (App. 313) and the affidavit of Clerk Johnson (App. 313-4). The affidavit appears at App. 147 and a supplemental affidavit at App. 417. Commissioner Crooks, who had testified before Judge Barnes, meantime had died and his private employee, Richard Jongsma, was examined (App. 315, *et seq.*). The two records together show:

That in selecting prospective jurors from Cook County the Clerk (a) took names from membership rosters of several private organizations, (b) accepted "volunteers," (c) accepted nominations by former grand and petit jurors and a few other persons including persons on the staff of

the District Attorney (S. 127-215); that about 60% of those selected by him were nominated by former jurors and 20% were "volunteers" (S. 168, 169);

That for areas in the district outside of Cook County the Clerk substantially delegated his duty of selection to sundry postmasters who made nominations pursuant to a form letter of instruction (S. 164-168, 196) which had the effect of excluding persons who were not adherents of some established religious faith and which resulted in a substantial number of "volunteers" (S. 162-168; 198, 280);

That Commissioner Crooks entirely abandoned his non-delegable duty of selection to a private employee (one Richard Jongsma) and was unable to say how the persons supposedly, but not actually, selected by him were selected (S. 227, 228, 235, 236, 242);

That Jongsma sent out letters to various clubs, churches and organizations in Chicago and soliciting volunteers (App. 139-145), that questionnaires were then sent to various prospective jurors; that Jongsma, rather than Crooks, read the answers to the questionnaires and decided whether the jurors were qualified to serve; that at one time a citizen had written a letter to the "Voice of the People," a readers' letter column appearing in the Chicago Tribune, complaining about never being called for jury service, whereupon Crooks sent a letter to the writer asking him to serve and sent a copy of it to the newspaper column calling for "volunteers" (App. 316-323);

That the first time Jongsma had realized that volunteers were disqualified as jurors under the law of Illinois was when he was so informed in the hearing before Judge Nordbye on April 21, 1958; he cannot say that there is a single one of the names on either the petit or the grand jury that Jury Commissioner Crooks exercised any personal judgment on (App. 338-9).

The evidence as to the Jury Commissioner's delegation of the exercise of judgment in selecting prospective jurors is shown in the following:

> "Q. You [Jongsma] read the questionnaires and you made the determinations?
>
> "A. According to the stipulation set forth in the law, yes.
>
> "Q. You made them according to your understanding of the law?
>
> "A. That is right.
>
> • • • • •
>
> "Q. Are there any other names we have gone over this morning on either the petit jury selection or the grand jury selection that you are able to say that Mr. Crooks exercised any personal judgment of his own on as to whether a single one of those names stayed out of the jury wheel or went in it?
>
> "A. I can't say that; I don't know." (App. 338-39.)

Jury Commissioner Crooks put it,

> "He [Richard] does all the work, and I take all the honor, if there is any." (S. 229.)

The foregoing quotations show that the finding of the District Court (App. 438) that Crooks made the decisions "although he delegated many of the ministerial duties to Jongsma" is flatly contrary to the record.

In Appendix D hereto is set forth the composition of both the grand and the petit juries and the sources of the names. The Appendix shows that 10 of the grand jurors were selected by the Clerk and 13 were selected by Mr. Jongsma. Of the 23, 9 (39%) were volunteers and 1 was "perhaps" a volunteer; 6 had been recommended by former grand jurors, and 1 had been recommended by a former petit juror (30%); 6 were selected by Jongsma from random use of telephone directories (26%). On the petit

jury, including alternates. 8 were selected by the Clerk and 6 were selected by Jongsma. Jongsma included 1 volunteer; the other 5 of his selections came from telephone directories; 1 of Clerk Johnson's selections came from a list of members of the Illinois Opera Guild, 2 from the membership list of the League of Women Voters (the identical list whose use was condemned in this District several years earlier by this Court in *Glasser* v. *U. S.*, 315 U. S. 60); 2 had been recommended by former petit jurors, 2 by former grand jurors, and 4 by an individual (35%).

## SUMMARY OF ARGUMENT.

It is now clear that petitioners, induced by promises of immunity from highest officials of the Treasury and desiring to achieve that immunity, voluntarily went to it and disclosed that there were serious omissions from Shotwell's income tax returns. Thereafter, at the request of Treasury officials, they prepared special computations pertaining to the omissions as an aid to Treasury agents in making a proper civil assessment.

We believe that the proper disposition of this case should have been an overruling of the Government's demurrer to the motion to dismiss, which demurrer in effect admitted the facts above set forth but contended that the promise of the Secretary to grant immunity could not be enforced judicially because he was not authorized to make the promise. Section 3761 of the Internal Revenue Code (1939), and predecessor sections for many years have authorized higher officials of the Treasury to "compromise any * * * criminal case arising under the Internal Revenue laws". Criminal liability may be compromised only by abating or waiving entirely, as was here promised, the criminal penalty. When the "voluntary disclosure" policy with respect to income taxes was first promulgated in 1919 it was recognized by official Treasury announcement, to be a variety of criminal compromise.

Incalculable harm will be done to our national institutions if Federal courts hold that official promises made to citizens by Federal officials may be broken with impunity. The Government cannot afford to show less honor in dealing with citizens than it demands of them.

But even if the promised immunity is not judicially en-

forceable, once it is established that relying on, and motivated by, promises of immunity, potential defendants prepared and surrendered confessional material, it is clear that material so induced cannot be introduced against them in a criminal trial except in violation of the guarantees of the Fifth Amendment of due process of law and against self-incrimination.

*Bram* v. *United States*, 168 U. S. 532, 542, 564, holds that a confession induced or engendered by "a suggestion of some benefit [to the maker] as to the crime" is not a voluntary statement and is incompetent because the Fifth Amendment requires that no person shall be compelled in any criminal case to be a witness against himself.

Not only is confessional material induced from the declarant by promising him some benefit obnoxious to the self-crimination ban of the Fifth Amendment, it is also obnoxious to that Amendment's guarantee of due process of law. The Constitutional bar applies regardless of whether the confessional declaration is probably true or probably false. (*Rogers* v. *Richmond*, 365 U. S. 534). And certainly a belief that part of a so-called confession is false does not make it admissible.

Apart from the Constitutional guarantees, common law forbids reception of confessional material induced by promises of immunity because of inherent unreliability of such evidence the confessor often being willing, as here, to confess things he did not do simply to be sure he is not prosecuted.

Until this case, it was conceded by the Treasury that if a citizen disclosed that there were errors and omissions in his tax returns his actions and declarations in so doing could not be used against him even though he utterly failed to cooperate with the Treasury in assessing the tax and frustrated collection.

The processes resorted to in obtaining this Court's 1957 remandment order and in building an asserted new case against petitioners was a defilement of Federal criminal procedures: When the case was first here this Court recognized that either the original evidence that a disclosure had been made considerably prior to June 1948 was a fraud on the courts, or that the showing made here to the effect that a disclosure was not, and could not have been made until some time after June, 1948, was itself the "product of fraud." The two showings were utterly antagonistic. It now has been found that Busby was informed of the facts in early January, 1948, that the disclosure was made "some time" before June 21, 1948 and that the sequence of events that led to and followed the disclosure were as testified to upon the original hearing.

Relevant, exculpatory evidence was suppressed by the prosecutors and withheld from the Court which was induced to delay the case while witnesses were ceaselessly interrogated until their stories fitted into the preconceived suspicion of the Treasury Department. Vital evidence seriously affecting the credibility of the witnesses was suppressed and withheld from this Court. This was an intolerable abuse of decency in criminal law. Prosecutors owe complete candor to the courts they serve and the defendants they prosecute and must disclose exculpatory evidence.

The new hearing disclosed that the original convictions obtained from the jury were tainted by perjury by the prosecution's star witness. The dignity of the United States Government does not permit sentences to be entered on convictions which are founded upon a tainted record.

Both the Grand and Petit Juries were illegal: All of the jurors whose names were put in the jury wheel by the Jury Commissioner actually were selected not through the

exercise of his non-delegable judgment or discretion but that of a wholly unauthorized private person to whom the Commissioner delegated all but the ceremonial functions of his office. The standards of selection used by the Clerk of the Court for selecting his half of the prospective jurors made it impossible for the Clerk to select a fair cross-section of the population. He relied heavily upon volunteers who were incompetent to serve under the law of Illinois. He relied heavily upon a system of nominations by former grand jurors and continued to use as a source of prospective jury members membership lists of selected private organizations including the identical list of a private organization (League of Women Voters) which this Court had said in *Glasser* v. *United States*, 350 U. S. 60 could not be used in the Northern District of Illinois.

On the trial the Court erroneously told the jury to determine petitioner Sullivan's guilt on evidence not admitted against him.

# ARGUMENT.

## I.

## CONFESSIONAL MATERIAL PROCURED FROM A POTENTIAL DEFENDANT BY PROMISING IMMUNITY CANNOT CONSTITUTIONALLY BE USED AGAINST HIM IN A SUBSEQUENT CRIMINAL PROSECUTION.

### A. The Nature of the Problem.

Although the Treasury's voluntary disclosure program had its first widespread publicity in the 1940s, it was not then a new program. The term "voluntary disclosure" appears first to have been used in 1919 by then Commissioner of Internal Revenue Daniel C. Roper who, on August 22, 1919, issued a bulletin to all Collectors and Revenue Agents in Charge which was amended September 8, 1919 (R. 3128-9). It stated that if fraud or intentional evasion was discovered by the officers, or if it was disclosed after the Bureau had initiated an investigation, the Bureau would impose maximum civil penalties and institute criminal prosecution. It then said:

> "In cases in which *voluntary disclosure* is made of deficiencies through intentional evasions which if discovered by Internal Revenue officers would be made the basis of criminal prosecution, it will be the policy of the Bureau to impose maximum civil penalties and to consider offers in *compromise of the criminal liability*, instead of instituting prosecution and insisting on jail sentence." (Emphasis supplied.)

The policy was restated by Commissioner Helvering June 27, 1934 to say that where deliberate violation was discovered by the officers or was disclosed by the taxpayer *after* the Bureau had initiated the investigation, "the

criminal liability will in no case *be compromised*," but where taxpayers made voluntary disclosures before investigation had been initiated the Bureau would not recommend criminal prosecution (R. 3130). Various statements of the policy in the 1940s are collected in Appendix B hereto.

The program was not new or novel in the 1940s. It had been followed for many years and the presumption of administrative regularity necessarily attached to it. The successive Commissioners of Internal Revenue and Secretaries of the Treasury can scarcely be deemed to have been acting without authority. The verbiage of both the 1939 and 1934 announcements clearly indicate that the officials believed they were authorized to "compromise" criminal cases as they were authorized to do under Section 3761 of the 1939 Internal Revenue Code (Appendix A) and predecessor statutes.

The motion to dismiss (plea in bar) in this case was held legally insufficient by Judge Barnes on the ground that "uncompleted negotiations for compromise should not be permitted to give rise to an estoppel" (R. 98). This was on the general theory that the immunity could not be enforced unless the written record described in subsection (b) of Section 3761 had been prepared. However, in a solely criminal case and in which no abatement or diminution of the tax was involved the record making requirement is unnecessary. *Willingham* v. *United States*, 5 Cir., 208 Fed. 137; *Rau* v. *United States*, 2 Cir., 260 Fed. 131; *Oliver* v. *United States*, 4 Cir., 267 Fed. 544, decided under Section 3229 of the Revised Statutes, the predecessor of Section 3761 of the Internal Revenue Code of 1939.

The first opinion of the Court of Appeals here held that the immunity was not enforceable because the promise was beyond the authority of the Treasury Department and could be made only by an act of Congress, citing *Whiskey*

*Cases,* 99 U. S. 594, which merely held that an ordinary prosecutor cannot make binding compromises of miscellaneous criminal cases. The Court of Appeals also cited *United States* v. *Lustig,* 2 Cir., 163 F. 2d 85, for the proposition that the formalities required by Section 3761 must be observed in a purely criminal case. That Court had relied upon *Botany Worchester Mills* v. *United States,* 278 U. S. 282, a *civil* case. The *non sequitur* is apparent. *Willingham, Rau* and *Oliver, supra,* show the error.

Because of the complexity of this record and the unique problems resulting from the unusual posture of this case, we did not pose as a question for certiorari the question of judicial enforcement of solemn promise from highest sources in the Federal Government authorized to "compromise" criminal cases of this variety.

We suggest, however, that the Court may wish to consider the basic moral problem that is raised when the Federal Government takes the position that as a matter of law promises of the highest tax collecting official in the country to the citizens cannot be enforced. The Court, in its discretion, may consider that a proper disposition of this case would be to hold that petitioners' original motion to dismiss stated a complete plea in bar which was good against demurrer; that if the Government wished to controvert the allegations of the motion to dismiss (plea in bar) it should do so and the resulting issue be heard by a separate jury (See n. ....., p. ....., *infra*).

**B. Regardless of Whether the Promised Immunity Could Be Enforced, Confessional Material Induced From Petitioners by the Promise Could Not Constitutionally Be Used Against Them.**

A fundamental error made by the Courts below was to confuse the question of whether what they regarded as a full and complete voluntary disclosure which would have entitled petitioners to immunity had been made, with the separate question as to whether evidence induced from petitioners by the promises of immunity could be used against them in a criminal trial.

Although the motion to suppress (R. 120 ff.) raised the constitutional question, and both the first opinion of the Court of Appeals and the dissenting opinion of this Court when the case was first here showed its seriousness, neither the second opinion of the District Court nor the second opinion of the Court of Appeals even discuss it.

Out of the welter of confusion engendered by the constantly shifting positions of the prosecution, the following clear and, we think, determinative admission is made by the Government in its Brief in Opposition to the Petition for Certiorari (p. 13) which lays at rest what had been bitterly disputed points:

> "A public offer was made to all taxpayers; and petitioners, who had not even been accused, voluntarily came forward and admitted unreported receipts.
>
> The overreaching here was on the part of petitioners, who wished to avail themselves of the offer of immunity and yet evade, by a new falsification, payment of the taxes which the immunity offer was designed to collect." (Br. in Opp. p. 13.)

The foregoing statement concedes that the offer of immunity was made, that petitioners came forth voluntarily, before start of investigation, that they relied on the offer,

that they wanted to achieve immunity. Whether petitioners should have the immunity is one thing; whether statements and material, true or false, extracted from them by the lure of immunity can be used against them in a criminal trial is another.

The "unreported receipts" referred to in the foregoing quotation is all of the "Recapitulation" shown at page 85 of the Petition for Certiorari, down to the heading "Disbursements", and all of pages 86, 87, 88, 89 and 90. (A typewritten form of this Recapitulation appears at p. 117 of Ex. Vol. I, less legible reproduction of supporting sheets at pages 122-126 of Ex. Vol. I.) The alleged "new falsification" referred to is that portion of the "Recapitulation" below the heading "Disbursements", at p. 85 (of the Petition).

In the foregoing quotation the government is taking two positions, both of which are untenable.

*First*, it is saying that the constitutional question as to use of confessional material may be answered by taking into consideration the opinion of a court as to the truth or falsity of its contents. This is legally impermissible.

*Secondly*, this record contains Treasury directives forbidding deduction for tax purposes of the "Disbursements" Section; Sauber testified that he told petitioners nothing would be allowed for over-ceiling disbursements; and uncontradicted testimony of Cain was that it made no difference what the disbursements were because "it isn't going to be allowed anyway" (R. 2586) or, as Cain put in another place:

> "The time that we spent on this was spent in finding how much the maximum income to the Company was, not the outgo. We didn't care what the outgo was because we knew it wasn't going to be allowed to us anyway." (R. 2601.)

There is thus no room to claim that petitioners were endeavoring to "evade payment of the taxes" on the added income by handing in the "Disbursements" portion of "Recap". Indeed, on the new hearing Revenue Agent in Charge Wright agreed that petitioners implored him to give them a bill on whatever basis he believed proper. (App. 1006-1007.) But Wright wanted them to turn informer.

If those making the disclosure on behalf of Shotwell would have disclosed the identity of the recipients of Shotwell's black-market disbursements they might have put the Treasury on the scent of persons who might have failed to report such income. If it be assumed, as the Government contends and petitioners deny, that some of the Lubben money was disbursed as so-called constructive dividends to one or more of the officers of the company the same situation might obtain. There was nothing in the disclosure policy, nor is there anything in the constitutional inhibition against use of confessional material procured by promise of immunity, that compels the discloser or confessor to turn informer on any one whether he be a supplier of goods to the disclosing corporate taxpayer or one of its officers. Essentially it is the failure of petitioners to turn informer that has been held to deny them immunity but that certainly should not make admissible against them confessional material otherwise clearly inadmissible.

When the case was here before the dissenting opinion noted that there might be a question as to how far "good faith" or lack of "good faith" in a disclosure might affect the constitutional inhibition. We know of no American case on the subject, but there is English authority under a disclosure policy virtually identical with that of the American policy which holds that even where the discloser gives misleading information intended to reduce the tax

declaration by a suggestion of some benefit that might accrue to him from making it destroys its true voluntary character; that implied promises, however slight, destroy the voluntary character of confessional material because the law cannot measure the force of the influence used or its effect upon the mind of the declarant; that the Fifth Amendment's guarantee against self-crimination forbids the use of material obtained by promises, direct or implied, of benefits.

2. *Rogers* v. *Richmond*, 365 U. S. 534, did not weigh the problem in the light of the Fifth Amendment's guarantee against self-crimination but tested it in the light of the due process guarantee of the Fourteenth Amendment. Whatever is said in *Rogers* v. *Richmond* with respect to due process in the state courts under the Fourteenth Amendment applies equally to due process in federal courts under the Fifth Amendment's similar guarantee. *Rogers* v. *Richmond* held that the question of admissibility of confessional material in criminal cases must be decided with complete disregard of its probable truth or falsity; that the due process clause forbids involuntary confessional material "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatory and not an inquisitive system—a system in which the State must establish guilt by evidence independently and freely secured." *Lisbena* v. *California*, 314 U. S. 219, 236 and *Blackburn* v. *Alabama*, 361 U. S. 199, 206, stand for the same doctrine.

3. At common law confessions obtained by promises of immunity or benefits excluded because they are "testimonially untrustworthy." As Wigmore puts it (*Wigmore* on *Evidence*, 3rd Ed., par. 822) "• • • a promise of certain pardon when attached to a confession, may conceiv-

ably make a confession, irrespective of its truth, seem more desirable than silence with its contingencies * * *."

4. The principles we have referred to all lead to a common end—that confessional material procured by promises of immunity is inadmissible. Pursuant to them it consistently has been held that where, as the Government concedes here, "the disclosure was timely" (Note 3 to Court of Appeals decision) the documents submitted by the taxpayer could not be used against him, if immunity was refused. (*White* v. *U. S.*, 5 Cir., 194 F. 2d 215 (c. d. 343 U. S. 930); *Biggs* v. *U. S.*, 6 Cir., 246 F. 2d 40; *Monroe* v. *U. S.*, 5 Cir., 215 F. 2d 81; *Lupides* v. *U. S.*, 2 Cir., 215 F. 2d 253; *In re Liebster*, 91 F. Supp. 814. Cf. *State* v. *DeCola*, 33 N. J. 335, 352-3; 164 A. 2d 729.)

The Treasury itself assured Congress that documents submitted in a disclosure made in good faith reliance on the promise of immunity could not be used against the taxpayer even if the disclosure was defective (R. 3109).

It may be observed that the process of obtaining evidence in this obnoxious manner is so inherently vicious that it violates not only the Fifth Amendment's guarantee of due process of law, but the guarantee of the Fourth Amendment against unreasonable searches and seizures which are made by fraud, stealth or trick. (*Exaternal Order* v. *U. S.*, 3 Cir., 57 F. 2d 93, 94; *U. S.* v. *Guerrina*, D. C. Ky., 112 F. Supp. 126; *U. S.* v. *Mitchneck*, D. C. Pa., 2 F. Supp. 225.) We suggest it is manifest that an admission or confession of numerous transactions which in fact did not occur at all, or did not occur in the amounts admitted which is given to fit "exaggerated" claims or accusations made, or that are known will be made, and which, is given to secure the prize of immunity, are admissions which are obtained by stealth or trick if the immunity is denied. Both the Fourth and Fifth Amendments must,

"receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled* v. *United States*, 255 U. S. 298, 304.

The interplay of the foregoing principles on this record is clear: persons whom the average citizen would believe had authority to promise immunity and who actually do control the institution of criminal income tax cases, promised immunity for voluntary disclosures. Petitioners in reliance on them, cooperated in coming forth and disclosing Shotwell as having filed a return which omitted a considerable, but undetermined, amount of gross income. Then, believing that they had achieved immunity, they prepared material which "confessed" to "exaggerated" transactions with Lubben. No business man in his right mind would have done what petitioners did if he did not believe that the possible criminal aspects of the matter had been laid at rest and he was dealing only with a civil liability.

The District Court believed petitioners did not tell the complete truth as to what Shotwell did with some of whatever amount of money was involved and, therefore, applying the touchstone of "truth" or "falsity" to the confessional material, held it could be received because partially false.

The vice of the District Court's theory is even worse than the theory of the lower court in *Rogers* v. *Richmond*. There a confession was admitted on the ground that the offer of benefit extended to get it (exempting the declarant's wife from interrogation) was not sufficient to overcome the probability of *truth* in the confession. But here confessional material was admitted because the trial court thought part of it was *false*.

The District Court finds fault with petitioners because in purporting to account for the total amount of money that Lubben said he had paid Shotwell petitioners did not confess, as the District Court believes they should, that some of this money ultimately went, so he believes, to some of the corporate officers. The District Court says that because of this element of supposed falsity in the material delivered to Internal Revenue after the disclosure, the material is admissible against petitioners for two reasons, (1) the part of it referring to "Receipts", although concededly partially false because keyed to the "exaggerated" claims of what Lubben said he had paid, nevertheless is binding on petitioners as an *admission* (the theory adopted by the Court of Appeals), (2) the portion of the material ("Disbursements") which the District Court believes was falsified to conceal alleged constructive dividends to some of the corporate officers destroys the "good faith" of the statement or confession so that petitioners may not urge the constitutional inhibition against reception in evidence of material obtained by promises of immunity.

The premise for the entire chain of reasoning is that a court may consider the probable truth or falsity, or the degree of truth or falsity, of material induced by promises of immunity, in determining constitutional admissibility. Carried to its end, this pernicious doctrine would result in a holding that an utterly false confession in which a suspect completely confessed to a crime he did not commit in order to obtain immunity, or perhaps to protect some other person, could be received in evidence and used to convict the innocent "confessor". The error in the case at bar is almost as repulsive, for, reduced to essentials, the holding of the District Court and the Court of Appeals is that the material here could be used to convict because it was found to be at least partially false—a doctrine more abhorrent to our traditions is difficult to conceive.

## II.

**CRIMINAL JUSTICE AND THE PROCESSES OF THIS COURT WERE ABUSED BY INDUCING IT TO DELAY ACTION FOR NEARLY A YEAR AND ULTIMATELY TO REMAND THE CASE BY CONCEALMENT OF THE FACT THAT THE WITNESSES WHOSE AFFIDAVITS WERE FINALLY FILED HAD REPEATEDLY SWORN TO THE CONTRARY OF THEIR AFFIDAVITS WHILE THE CASE WAS BEING INVESTIGATED AND CHANGED THEIR TESTIMONY ONLY AFTER BEING SUBJECTED TO REPEATED INTERROGATIONS, REFRESHER COURSES AND OTHER SOPHISTICATED FORMS OF PRESSURE.**

This case presents a course of defilement of law enforcement procedures that violates basic standards of decency:

Sometime in March 1955 officials in the national office of the Internal Revenue Service embraced an ill-founded "suspicion" that the Shotwell disclosure could not have been made until after June 21, 1948. Thereupon, an investigation was opened and from thence until the remanded hearing in December 1958 every scrap of evidence contrary to the Treasury's theory, or that was "glaringly inconsistent" with what was selected for presentation to this Court, was ruthlessly suppressed.

The Motion to Remand in this Court should have been decided on the basis of all relevant facts in the possession of the prosecutors while the Motion was pending, and relevant facts include not merely facts as to what did or did not occur in connection with the disclosure, but facts bearing upon the credibility of the witnesses. The Court was entitled to that treatment; petitioners were entitled to it. Facts and witnesses should have been presented in their true colors.

But quite the contrary occurred. Not only were facts withheld but witnesses were ceaselessly interrogated. If

they did not give the desired answer the first time, they were asked, and asked, and asked until they finally gave an answer that fit the theory. No doubt they ceremoniously were told that all that was desired was the truth. But when a government employee in Lima's situation is pressed repeatedly, for example, as to whether he made and destroyed a revenue agent's *report* and every time he swears he did not, is interrogated all over again, he is bound to decide he ought to change his answer. He did. And Graflund did.

The ultimate and lurid picture presented to this Court in 1957 of an alleged perjurious concoction by petitioners of a disclosure which did not occur at all, was too perfect to be the result of mere unrelated changes in the memories of Huebner, Graflund and Lima. Each material part of the horrendous new story, *insofar as it was revealed to this Court*, dovetailed and mortised neatly with its other parts. The Huebner-Graflund-Lima 1957 story of no disclosure (*so far as revealed to this Court*) was internally consistent and made what this Court found to be "a convincing showing" that cast the "darkest shadow" on the 1952 suppression evidence.

Yet this Court entertained a nagging doubt as to whether so bold and widespread a conspiracy of perjury as the prosecutors claimed—a perjurious construction of an entire series of events spanning a period of nearly six months and involving several people—possibly could have taken place.

The Court recognized the deadly seriousness of the situation, for it opened its opinion by saying,

> **"This case presents an unusual question involving the integrity of a criminal trial in the federal courts."**

manded hearing to force the production of the grand jury testimony of Graflund and Lima.)

Thus came about the showing that at the time the Motion to Remand was being filed in this Court Government counsel in the field had taken, after intensive investigation, voluminous sworn testimony that was utterly antagonistic to the theories being propounded to this Court, but withheld all knowledge of it from the Court.

If we now revert to the dilemma stated in this Court's opinion that either the original 1952 suppression hearing testimony in the District Court was untrue or the 1957 affidavits presented to this Court are the product of fraud, we find that when Judge Nordbye's 1959 opinion, even with its harsh language against petitioners, is analyzed, it (a) excuses Government counsel from subornation of perjury, but (b) does not even touch upon their withholding of exculpatory evidence and their complete lack of candor to the highest Court in the country. (c) Equally important, from petitioner's point of view, is that although Judge Nordbye finds that in his opinion fraud permeated the disclosure, he does not find that a syllable of perjury was given by Busby, Cain or Sauber in their 1952 testimony when they described what had taken place.

It is clear, therefore, that regardless of whether what petitioners said when they made the 1948 disclosure legally constituted a good and valid disclosure, their testimony and description in 1952 of what they had said and done in 1948 was a true description and was true testimony. The first half of the dilemma posed by this Court is therefore clearly answered—the original testimony in the District Court was true.

Petitioners have been the victims of relentless determination by someone in the Treasury to retain a conviction by whatever means from time to time seemed expedient,

and that determination, unfortunately, has swept over and embraced at least some persons in the Justice Department.

Before considering the duties resting upon federal prosecutors, we suggest it may be observed that even in commercial transactions one who has knowledge of material facts inconsistent with the facts he actually stated to another, and wilfully conceals the inconsistent facts, is guilty of fraud. (*Equitable Life Insurance Company v. Halsey, Stuart & Co.*, 312 U. S. 410, 425; American Law Institute, *Restatement of Torts*, Sec. 529 and 551.) Tested even by the rules of commercial morality, the conduct of the prosecutors was fraudulent. Tested by the higher standards that must prevail in the relationship between this Court and the members of its bar, the conduct is even more deplorable.

When the affidavits and representations were presented in 1956 and 1957, the Court had every reason to accept them as a fair portrayal of the facts, as the prosecutors knew them, relevant to the contentions raised. Moreover, since the prosecutors voiced no doubt as to the credibility of the affiants, the Court was entitled to, and undoubtedly did, assume that the prosecutors vouched for the credibility of the affiants. In view of the unusual order which the Motion to Remand requested, the Court was entitled to assume, and undoubtedly did assume, that the affidavits had been impeccably obtained. The Court could not remotely have dreamed that the prosecutors were withholding sworn evidence of the very witnesses they promised to produce which showed the utter falsity of their stories in numerous respects.

The simplest example is the treatment of Graflund's revelation of the black-market facts to Busby in January 1948. As heretofore pointed out, this episode was the cornerstone, or starting place, for the entire history of the disclosure. It was essential for petitioners, when the

liability, which was not the case here, that books and information surrendered in reliance on the promise of immunity must be suppressed.

In *Rex* v. *Barker*, 2 K. B. 281 [1941] one Barker

"was convicted on an indictment charging him and one Robinson, with having conspired to defraud the Crown of taxes due from Robinson. Four years before the indictment and after the Commissioners had made an order on Robinson for the production of books and documents, an inspector, representing the Commissioners of Revenue, in an interview with Barker and Robinson, read them an abstract of a Ministerial statement, from Hansard's Parliamentary Debates, which said in part:

> "'Where the taxpayer takes the initiative and voluntarily discloses the fact of his past frauds and their full extent and is also prepared to facilitate investigation and to furnish full evidence (including not only the business books and records, but also private bank books), as may be required on behalf of the board as to the amount of the correct liability, *the board will not institute criminal proceedings*, but will accept a pecuniary settlement.' (Emphasis supplied.)

"Thereafter appellant and Robinson produced ledgers which had been fraudulently prepared to show that the irregularities in question amounted to £7000. At a later interview two further ledgers were produced, together with working papers, which showed that the earlier ones had been prepared to deceive the authorities and that the full amount was £10,400. Later, a letter was written confessing a greater amount. Defendant claimed that the documents produced after the reading of the statement were inadmissible because their production had resulted from a promise or threat held out by the authorities. The objection was overruled and appellant and Robinson were convicted. On appeal the Court reversed and said at page 384:

"'. . . in the present case the promise or induce-

ment which was implied in this extract from Hansard expressly related to the production of business books and records, and the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise or inducement is held out, or the threat made, those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.

"'The result is that, in the opinion of the court, these vital documents and books, namely, the ledgers and the working papers of the appellant, were wrongly admitted in evidence and in those circumstances the conviction of the appellant cannot stand. The court has not lost sight of the fact that the extract from Hansard in terms refers to taxpayers and not to an accountant, but, having regard to all the circumstances of this case and what took place on December 31, 1937, the court has no doubt that the promise contained in the document was intended to apply and was held out to the appellant just as much as to Robinson.'"

Four basic principles are involved, covered by the *Bram* and *Rogers* cases about to be cited, *Wigmore on Evidence* and the Treasury's uniform admission, until this case, that material extracted from a taxpayer by promising him immunity from prosecution could not be used against him in a subsequent criminal trial. The citations of authority and the reasoning contained in *Bram* and *Rogers* and in *Wigmore* represent such thorough research that there is nothing we can add of genuine legal significance to the discussions therein.

1. *Bram* v. *United States*, 168 U. S. 532, holds that confessional material to be constitutionally admissible must be wholly free and voluntary; that any statement or inducement by which the declarant was influenced to make his

And at the foot of page 242, it stated the inescapable dilemma,

> "It is plain that either the testimony in the District Court was untrue or these affidavits themselves are the product of fraud."

Had it not been for the rule of *Jencks* v. *United States*, 353 U. S. 657, petitioners might have been unable to show that the original evidence that a disclosure had been made was true and that the 1957 claim to this Court was false.

Petitioners faced a formidable task when the case was remanded, for although they knew that the showing made to this Court was untrue and necessarily the product of fraud, establishing that this was so was quite a different matter. From the inception of the remanded proceeding petitioners endeavored to get some kind of a specification of the evidence or a bill of particulars (App. 119-124, 145, 163-203, 263, 264, 294-5, 301-6, 414, 425-8) that would give them an opportunity to prepare for the untrue stories they knew Huebner, Graflund and Lima would have to tell. Those pre-trial efforts were resisted by the prosecutors who, *inter alia*, said:

> "* * * it goes without saying that the Government has no intention of submitting any affidavits before, or any statements made by Mr. Huebner or Mr. Graflund or any other prospective witness prior to trial except as at the hearing the Court may order the Government to turn over such statements." (App. 297.)

Under the *Jencks* rule the prosecutors were required to deliver Huebner's statements, or memoranda of statements he had made, when he took the stand. There were seven of these and they totalled 74 pages. (App. 555.) Digesting this mass of conflicting material while the hearings were proceeding was difficult, and counsel for petitioners doubtless did not do as thorough a job as would be desirable. However, it provided a toehold and from it Huebner was

badly impeached in the opening stages of his cross-examination.

Counsel for petitioners knew from the "Chronology" attached to the Brief for the United States when the case was first here that Huebner had testified before the grand jury sometime between August 21 and August 30, 1956. His testimony in chief on the remanded hearing was impeached in the beginning of his cross-examination by statements he had given both *before* and *after* August 21-30, 1956. On that showing petitioners moved for production of Huebner's testimony before the grand jury to see what he had sworn to on the same subject in the interval. (App. 829; Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 and Criminal Rule 6 (e).) Government counsel apparently had believed they could conceal the sworn testimony before the grand jury, for Mr. Russo confessed he "had not anticipated counsel's request for the grand jury minutes." (App. 834.)

This request for the minutes was made shortly before a noon recess, and although the District Court's opinion contains a finding that the Government voluntarily turned the minutes over, the finding is, to say the least, a generous one. The fact is that when the motion for production was made, Government counsel asked that they have over the noon recess to prepare a response. (App. 834.) Only when court resumed in the afternoon and counsel for petitioners had a stack of law books on the table showing their right under the circumstances of the case to the minutes, did Government counsel yield. The minutes were withheld until the close of that session, at which time the three lengthy volumes of Huebner's testimony were turned over to counsel for the defendants. (App. 891.)

(With the precedent set in obtaining Huebner's grand jury testimony, it was relatively easy later on in the re-

disclosure was called into question, to establish that Graflund *did* reveal the blackmarket facts to Busby, else petitioners' entire 1952 narration of the disclosure events was without starting point, reason or motive. It was essential for the prosecutors, if they wish to destroy petitioners, to destroy the January 1948 revelation of Graflund to Busby. Graflund was repeatedly interviewed in 1956, and he told in natural, convincing fashion and in normal language, how he had revealed the facts to Busby in January and "hadn't spared the horses" in doing it. He swore under oath repeatedly to the new grand jury how and why he had done it.

Yet, with all of that evidence in their possession, the prosecutors finally got a recantation out of Graflund and presented this Court with an affidavit which said the January revelation had *not* taken place; that Busby was startled to learn of the black-market transactions in late June 1948. We think it goes without saying that decency in federal law enforcement forbids prosecutors to use court procedures to hold criminal cases in abeyance while for months they interrogate and re-interrogate a witness until he recants the truth and tells a lie. Certainly, the Court was entitled to know that the affidavit was a recantation of previously given solemn statements and sworn testimony to a federal grand jury.

There is little that an ordinary member of the bar feels either the necessity, or the freedom, of saying, to this Court about the requirements of decency in federal criminal procedures, the requisite of complete integrity, or the duties of prosecutors to see that justice is done. *Berger* v. *United States*, 295 U. S. 78, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, *Mesarosh* v. *United States*, 352 U. S. 1, *McNabb* v. *United States*, 318 U. S. 332, do not need adornment by us. In *McNabb* a prisoner was held for a few hours until local arresting officers got

all the "discrepancies" in his stories straightened out. In *Shotwell* the Court was induced to hold the case for upwards of a year until all the "discrepancies" in a new and false story were straightened out.

With respect to the duty of a prosecutor to disclose exculpatory or explanatory evidence, or evidence which bears materially on the credibility of a witness, the holding in *United States* v. *Zborowski* (2 Cir.), 271 F. 2d 661, 668 is squarely in point. There it was held that a trial prosecutor should have disclosed to the defendant on trial that a prosecution witness had given contrary grand jury testimony. The Court of Appeals for the Second Circuit said,

> "Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand."

Here the same kind of evidence, grand jury testimony, which the trial Court here found contained "glaring inconsistencies and contradictions" (App. 1768-69), was withheld from this Court in one of the most delicate and unusual criminal proceedings it had ever had presented to it. The affidavits here were not presented in their true colors. The withheld evidence destroyed the credibility of the witness Graflund on the crucial point in the entire maneuver and, of course, the withheld evidence destroyed numerous points throughout the new stories of the three witnesses.

Many authorities are collected in 60 Col. L. Rev. 858, "The Duty of the Prosecutor to Disclose Exculpatory Evidence"; see also *People* v. *Savvides*, 1 N. Y. 2d 554, 136 N. E. 2d 853, cited with approval in *Napue* v. *Ill.*, 360 U. S. 264; *Curran* v. *Delaware*, 3 Cir., 259 F. 2d 707, 713;

*U. S.* v. *Consolidated Laundries Corp.*, 291 F.2d 563, *1961 Trade Cases*, Par. 70,039.

It is respectfully submitted that both this Court, entitled to the highest degree of candor from public prosecutors, and petitioners have been outrageously abused.

It is also submitted that this record displays gross abuses of federal criminal processes. This point should be so disposed of by this Court that nothing like this can ever occur again for "life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves." (*Spano* v. *New York*, 360 U. S. 315, 324.)

## III.

### A NEW TRIAL SHOULD BE GRANTED BECAUSE THE GOVERNMENT'S NEW PROOF DISCLOSED THAT THE ORIGINAL CONVICTIONS WERE SECURED ON FALSE TESTIMONY.

Judge Nordbye, on remand, found that it was "entirely probable" that Lubben, the Government's star witness before the jury, "exaggerated" his testimony, *i.e.*, he "misrepresented on the side of greater size, extent, value, etc.; [he] overstated the truth." (*Webster's New International Dictionary*, 2d Ed., Unab.) The proper legal term is perjury.

In their Brief to the Court of Appeals on the first appeal the Government said (p. 17) "The primary direct evidence as to most of the receipts was the testimony of Lubben himself". At p. 57 it frankly admitted "Lubben's direct testimony as to the payments" was one of two main arches upon which "the structure of the Government's case rests. * * *"

At p. 33: "The jury obviously believed Lubben." Lubben's testimony not only was what swung the trial jury, it convinced Judge Nordbye. (R. 3017-8, 3073.)

Judge Nordbye on remand has found that Lubben's testimony on which the jury convictions depended was seriously false. There was no more important issue before the jury than that as to the gross amount of Lubben's payments, because unless defendants could establish that they had expended a like amount for raw materials, they were bound to be convicted.

On the jury trial the Government contended that Lubben's testimony (and books) proved a total of $454,000 (R. 1837-50). Because, *as now found*, that figure was seriously "exaggerated" defendants could not possibly show they spent that much for raw materials. On the remanded hearing Government witness Huebner flatly said that Lubben had "lied on the stand" when before the jury (App. 809); that Lubben lied when he testified he paid Graflund some $49,000 (App. 809); that one item (chocolate covered nuts) on which Lubben claimed he had paid $40,000 in "overages" had borne no "overages" at all. The new evidence, taking everything Huebner testified to at face value, is that Lubben paid only $234,000. That was the figure asserted by the prosecutors on remand. That is $220,000 less than what Lubben told the trial jury.

It was established, without contradiction on the new hearing, that Lubben's purported records which went to the jury had been "doctored" (App. 969) by one Tobias, who subsequently became a Treasury employee and made the admission while on the Treasury payroll. Tobias was not called to deny this admission. In at least one instance the doctoring was so crudely done that Lubben's Cash Disbursement book (p. 29 of Government Trial Ex. 7) recording a disbursement of $4200 paid to "General Commercial Association," was later altered in another hand by having the word "Shotwell" written across it. Yet these doctored so-called "records" went to the jury in 1953 vouched for by the United States as true. The prosecutor at that time,

and so far as we know in good faith, vouched to the jury as follows:

> "I will tell you who David Lubben is. He is an honest, honorable American citizen. * * * Dave Lubben is telling the truth." (R. 2937.)
>
> "What you have seen are the [Lubben] records which were kept by competent, honest people * * *." (R. 2879.)

Thus the United States in 1953 unfortunately vouched for a vicious falsifier and for false records.

Judge Nordbye found it was "entirely probable that Lubben exaggerated his testimony when before the jury" (App. 1758); that the probable amount which Lubben had paid, including $28,000 in the year 1944 which was not involved in the jury trial, was "between three and four hundred thousand dollars" (App. 1758). This means, even on the District Court's figures, that Lubben lied to the jury to the extent of at least $132,000—we think much more (Our computation of $132,000 is arrived at as follows: $454,000—($350,000—$28,000)=$132,000.)

It is manifest that the jury verdicts are "tainted" by "tainted" evidence. We are aware that on the Petition for Certiorari herein and the Brief in Opposition a dispute developed as to the precise amount of the variation between Huebner's testimony, Lubben's fantastic exaggerations and between both of them and the truth. Whether the amount of Lubben's perjury was $132,000, which is the figure that results from the District Court's findings, or $250,000, or $100,000, is largely immaterial, for in any event his exaggeration was so gross as to constitute willful perjury and gross deception.

In 1953 the District Court described Lubben as "honest" and "faithful" and found that *"twelve jurors believed he told the truth"* (R. 3073). In 1959 he no longer could find that Lubben had been honest but perhaps "mistaken";

he found Lubben had "exaggerated".[19] We suggest that verbiage is a mere euphemism for perjury; *in any event it is a finding that the jury was grossly misled by seriously false and vital testimony.* In this respect this case is the precise reverse of *U. S. v. Johnson*, 327 U. S. 106, referred to by the Court of Appeals, in which the trial court found that the Government's star witness had told the truth to the jury. It is a monstrous perversion of due process and rational logic to say that the Government may open a case up, prove that its star witness deceived a jury and yet insist that the question of credibility was for the jury which never had the benefit of the evidence which proved how it had been deceived.

We suggest that the Court of Appeals' holding that unless there be a formal finding of technical perjury, a federal judge may enter sentences on jury verdicts which he has found to be based on outrageously false testimony which the jury nevertheless accepted as true, is destructive of the standards of decency in criminal law enforcement this Court has always insisted on. The holding is especially incongruous coming in a case in which this Court was deeply concerned with the integrity of federal criminal processes.

The Court of Appeals' holding that there must be a specific finding of technical perjury is legally immaterial under the doctrine of this Court in *Mesarosh* v. *U. S.*, 352 U. S. 1. *Mesarosh* stands for the proposition that a conviction resting upon the testimony of a proven falsifier cannot

19. Since 1953 Lubben has been well documented as a congenital perjurer and swindler. The United States Attorney for the Southern District of New York describes him as "a perjurer and a black-marketeer and practically anything else you want to talk about" (R. 2589 of *Giglio* v. *U. S.*, 355 U. S. 339). *In re Carlsen*, 17 N. J. 338, 111 A. 2d 393, shows him in a distillery swindle in Puerto Rico in 1951. *State* v. *Weleck*, 34 N. J. Super. 267, 112 A. 2d 23, 25, again proves his penchant for perjury.

stand. In that case, when it was suggested that the Government's star witness had given false testimony before other tribunals, but which the Solicitor General was not prepared to say constituted legal perjury because possibly caused by a psychiatric condition of the witness, this Court granted a new trial, saying (352 U. S. at p. 9):

> "The question of whether his [Mazzei's] untruthfulness in these other proceedings constituted perjury, or was caused by a psychiatric condition, can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted and there can be no other just result than to accord petitioners a new trial."

At p. 14 this Court said:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

In *Mesarosh* the Solicitor General, on the basis of false testimony *in other cases*, thought there was a possibility of false testimony in the criminal proceeding. Here we have a judicial finding of *false testimony in the criminal case itself.*

To paraphrase this Court in the *Mesarosh* case, these petitioners were convicted by the tainted testimony of Lubben; the pollution caused by the tainted testimony can be cleansed only by granting a new trial.

In *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, this Court said at p. 124:

> "When an uncontested challenge is made that a finding of subversive design was in part the product of three perjurious witnesses it does not remove the taint for a reviewing court to find there was ample innocent testimony to support the Board's findings."

In both, *Mesarosh* and *Communist Party*, this Court cited *McNabb* v. *U. S.*, 318 U. S. 332, where the Court said (p. 340), "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

This Court has held it to be a denial of due process for a state to obtain a conviction by the knowing use of perjury. *Mooney* v. *Holohan*, 294 U. S. 103. In *Napue* v. *Illinois*, 360 U. S. 264, 269, it said, "The same result obtains, when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." False evidence here appeared before sentencing. The record should have been cleansed of that impurity before a jury which heard truth, not lies.

The District Court applied a double standard. He resentenced petitioners, although he did not find that they had committed any perjury in the first disclosure hearing, but ignored the fact that the evidence to sustain the conviction rests on the testimony of a witness he found to be a falsifier.

## IV.

## BOTH THE GRAND AND PETIT JURIES WERE ILLEGALLY SELECTED. PETITIONERS CAN RAISE THE POINTS.

### A.

### The Questions as to the Juries Are of National Importance.

There scarcely has been a time when it was more important than now that federal jurors be selected only by officials lawfully commissioned to do so and that methods of selection be calculated to produce a true cross-section of the population and to preclude interested persons from procuring jury service. As the federal government has moved into fields directly affecting the daily lives of all citizens and in which important rights will be determined by juries, jury selection procedures have become increasingly important.

The jury system will fail if strangers to the courts are permitted to select and to reject prospective jurors, or if the method of selection, even if used by proper officials, is not designed to secure a cross-section of the population but to secure whatever the selector may believe to be "good" jurors and to encourage "volunteers" to infiltrate themselves into jury service. And certainly the system will disintegrate if commands of this Court to end abuses are disobeyed. These evils all appear without dispute in this record.

The gross abuses in the Northern District of Illinois exposed by this record in the summer of 1957 produced a reformation by unanimous action of all the District Judges early in 1958. Jurors now are selected from voting lists, "volunteering" is not permitted, and there is a new Jury Commissioner who presumably is performing his functions (App. 150). However, the District Court and the

Court of Appeals, on grounds which we submit are without merit, *i.e.*, failure to show so-called actual prejudice, have refused to apply the proper remedy in the very case which showed the necessity of reform.[20] The instant opinion of the Court of Appeals gives encouragement to those who might wish to manipulate jury membership. This case presents an opportunity to make clear to jury selection officials (and to Courts of Appeal) throughout the nation what their duties are.

B.

**The Jury Commissioner Wholly Abandoned and Delegated His Duty of Selection.**

The law is explicit that the duties of the Clerk (or a deputy clerk) and the Jury Commissioner "may not be delegated." (*Glasser* v. *United States*, 315 U. S. 60, 85; *United States* v. *Murphy*, 224 F. 554, D. C. N. Y.; *In re Petition for Special Grand Jury*, 50 F. 2d 973, D. C. Pa.) The proper stringency of that rule is demonstrated by *Dunn* v. *United States*, 5 Cir., 238 F. 508, in which, at a time when the statute authorized only the Clerk and the Jury Commissioner to select jurors, a deputy clerk had in fact performed the Clerk's functions. Solely because of the delegation of the Clerk's functions a conviction was set aside. It was necessary to have the statute amended to its present form which permits a deputy clerk to exercise the duty of selec-

20. As shown in our Statement (p. 55, *infra*), the facts were first developed in June 1957 on motions to dismiss the new indictment brought against petitioners. Judge Barnes said he did "not enjoy listening to a challenge to the array. There is nothing interesting about that." (S. 274) and overruled the challenge (S. 275). Petitioners endeavored to secure review in that case by means of mandamus. (The S .... volume of the record here is actually the Appendix in support of that mandamus petition.) The writ was denied by the Court of Appeals without prejudice to the rights of petitioners to raise the matter on appeal in the event they are tried and convicted in that case which has not yet been brought to trial.

tion in large districts (See *House Rep. No. 1322*, 64th Cong., 2nd Sess.). The rule that federal jury selection officials may not delegate their duties of judgment and selection is not unique. It is the rule followed almost uniformly in the states.[21]

As our "Statement" shows, and as we shall further show herein, the Jury Commissioner in the Northern District of Illinois abandoned all but the ceremonial functions of his office; he delegated the exercise of judgment as to selection and rejection of prospective jurors to an unknown employee of a private corporation of which the Commissioner was the head. If delegation to court officials is bad (*Dunn* v. *United States*, *supra*), delegation to an unknown private hireling certainly must be more obnoxious.

The District Court overruled petitioners' objection with a finding that "Mr. Crooks [the Jury Commissioner] was the official who made the decision as to the names that should be sent in to the Clerk of Court as prospective jurors, although he delegated many of the ministerial duties to Jongsma" (App. 438). In the Court of Appeals petitioners charged there was no evidence to support that finding and challenged the Government to show any that would support it. The Government, because it could not meet it, ignored the challenge. The Court of Appeals, al-

21. *State* v. *McGee*, 80 Conn. 614, 69 A. 1059; *State ex rel. Jackson* v. *Jordan*, 101 Fl. 616, 135 So. 138; *People* v. *Boston*, 309 Ill. 77, 139 N. E. 880; *Flatter* v. *State*, 182 Ind. 514, 107 N. E. 9; *Stipp* v. *State*, 187 Ind. 211, 118 N. E. 818; *Wilson* v. *Commonwealth*, 287 Ky. 286, 152 S. W. 2d 952; *State* v. *Newhouse*, 29 La. Ann. 828; *State* v. *McNay*, 100 Md. 622, 60 A. 273; *People* v. *Tonnelier*, 167 Mich. 638, 133 N. W. 510; *Fornia* v. *Frazier*, 140 Mich. 631, 104 N. W. 447; *State* v. *Rouner*, 333 Mo. 1236, 64 S. W. 2d 916; *State* v. *Johnny*, 29 Nev. 203; 87 Pac. 3; *Hulse* v. *the State*, 35 Ohio St. 421; *Donaldson* v. *State*, 73 O. Cr. 41, 117 P. 2d 555; *Gay* v. *City of Eugene* (1909), 53 Ore. 289, 100 Pac. 306; *Klemmer* v. *Mt. Penn Gravity Ry. Co.*, 163 Pa. 521, 30 A. 274, 277; *State* v. *Muldoon*, 67 R. I. 80, 20 A. 2d 687; *Irvin* v. *State*, 57 Cr. Tex. 331, 123 S. W. 127.

though aware of the contention as to the Jury Commissioner's delegation of his duties (S. 298), failed to discuss it.

In the Petition for Certiorari petitioners asserted that the Solicitor General would "be unable to cite any substantial evidence showing that Commissioner Crooks selected a single one of the jurors theoretically selected by him" (Pet., p. 33). The Brief in Opposition failed to cite any such evidence. Nor will the brief in answer to this one refer to any. The finding that Commissioner Crooks delegated only ministerial duties is contrary to the record, which conclusively demonstrates that only Richard Jongsma exercised the judgment of selection or rejection, while the Commissioner performed only the ministerial task of dropping the names selected by Jongsma into the wheel. The matter is so grossly aggravated that further exploration of the record beyond the material in our "Statement" is illuminative:

The examination of Jury Commissioner Crooks occurred in June 1957 before the late Judge John P. Barnes, then senior Judge in the Northern District of Illinois, in the related case (see Note 20 and p. 5, fl., *infra*). Crooks' testimony loses color in cold print, which, although showing he could not answer the simplest questions and had to call on his assistant, Richard, to do so, fails to show that Richard was sitting half way across the large courtroom and that the Commissioner was shouting across the head of examining counsel to learn what he should say. It is a matter of choice which passage most completely exposed Mr. Crooks' abandonment of duty, but the following, occurring after it had been established that, after obtaining names of prospective jurors and before making final selections, Richard sent questionnaires to the prospects bearing upon their qualifications, is typical:

"Q. Did you [Crooks] read personally the ques-

tionnaires of the individuals [on the 1956 grand jury] whose names I gave you with respect to their answers to that question?

"A. I couldn't say so. I don't think so.

"Q. Can you say that you personally read any of the questionnaires, Mr. Crooks?

"A. Yes, sure.

"Q. Of the individuals whose names I gave to you?

"A. No. (Addressing Mr. Jongsma.) Maybe you read them, Richard.

"By Jongsma: Absolutely. I read them all." (S. 233.)

A few lines later:

"Q. You don't read, yourself, all of them [the questionnaires]?

"A. No.

"Q. You delegate that to Richard?

"A. What do you expect for nothing?

"Q. Please answer my question.

"A. I am answering you" (S. 233).

Again:

"Q. In selecting names for potential or prospective jurors—and I will confine this to the years 1952, '3, '4, '5 and up to the 15th of March of 1956—did you during that time send any letters to the postmasters requesting them to furnish you with names?

"Please don't look at your assistant.

"By the Witness: Well, he knows, and *I* don't know.

"Q. So you don't know whether names came about or whether that process was used in getting names for the juries?

"A. I couldn't tell you.

"Q. For which you have assumed responsibility?

"A. I can't tell you. Richard could tell you. Richard is on my payroll. I pay him. The Government pays me nothing, for twenty years, and I am just about fed up. I will give it to somebody else.

"Q. Mr. Crooks, is it fair to say that Richard does the work and gets the names, and you pay Richard?

"A. That's right.
"Q. Is that right?
"A. That's right.
"Q. And that Richard knows where these names come from and gets them, and you don't, is that correct?
"A. That's right.
"Q. And you have delegated the work of your office in large part to Richard?
"A. That's right, and he is very capable" (S. 235 6).[22]

Subsequently Richard Jongsma was examined before Judge Nordbye and admitted that *he*, and *not the Commissioner, made the determinations* as to whom to select and whom to reject after reading answers to the questionnaires (see p. 58, *infra*).

It is obvious that the District Court's finding that the Commissioner delegated only ministerial duties is contrary to the undisputed record and cannot stand. Crooks put it accurately, shamlessly and tersely when he admitted

"He [Richard] does all the work, and I take all the honor if there is any." (S. 229.)

The record demonstrates that every supposed selectee of the Commissioner that sat on these juries actually was selected by Richard Jongsma and not by the Jury Commissioner (App. 338-339). Translated into numbers this means that 13 members (56%) of the grand jury and 5 members (41% excluding alternates) of the petit jury were selected wholly outside the law.

A Jury Commissioner's function of selection and rejection is one of delicate importance. A Jury Commissioner is selected because it is believed he has the ability to exercise careful judgment responsibly. It never has been held

22. Richard did in fact circularize postmasters by a form letter over Crooks' signature which in substance called for people to volunteer to their local postmaster for service (App. 139-141).

heretofore, and never should be, that such fateful responsibility may be delegated.

The delegation point requires voiding of the indictments and convictions unless the Government is correct in its position that petitioners have waived their right to urge the point. Waiver will be discussed under subheading D below.

The Court of Appeals took the position that it was incumbent upon petitioners to show they were "actually prejudiced" by the various defects in jury selection procedures (S. 298-299). If by "actual prejudice" the Court of Appeals meant that petitioners failed to show that some individual with personal animus against them sat on one of the juries, it is conceded that no such showing was made; nor is such ever necessary. On the other hand, if by "actual prejudice" is meant a showing that the particular juries were heavily loaded with *de facto* members who had been selected by a total stranger to the jury system (or who were incompetent under the law of Illinois), then a showing of "actual prejudice" was made to the hilt.

Where a method of selection has been used which cannot be sanctioned by this Court, "it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion" (*Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 225). In that case wage earners who were paid by the day were excluded from the jury list. Because the process of selection was wrong, this Court held it was unnecessary to go into the question of so-called "actual prejudice." The matter is settled by *Ballard* v. *United States*, 329 U. S. 187, 195, holding:

> "But reversible error does not depend on a showing of prejudice in an individual case. * * * The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the com-

munity at large, and to the democratic ideal reflected in the processes of our courts."

Unless inroads are to be made into *Ballard* this case must be reversed.

C.

**Volunteers Were Permitted To Serve On the Jury. This Was Illegal Under the Statute In Effect As It Pertained to the State of Illinois Until 1958 and Should Be Illegal As to All Federal Juries.**

The tabulations of the juries (Appendix D hereto) show they were heavily infiltrated with "volunteers". Nine members of the grand jury (39%), possibly ten (43%), were such volunteers.

Under the federal statute in effect when these jurors were selected, each juror had to fulfill the requirements of the federal statute and could not be incompetent under the law of Illinois (28 U. S. C., 1952 Ed., Sec. 1861). Volunteers were incompetent under Section 13, Chapter 48, *Illinois Revised Statutes* of 1951 and, therefore, were incompetent as federal jurors. There is no doubt about this point. Once again therefore, both the grand and petit juries were illegal and the indictment and the convictions must be voided unless petitioners have waived their rights to object.

The practice of accepting volunteers is, and should be, generally recognized as wrongful. We append a note showing that under the statutes of at least twenty-six states volunteers are incompetent as jurors. In many states the mere act of unsuccessful volunteering is an offense punishable either as a special contempt of court, a misde-

meanor, or a felony.[23] The solid reasons behind those statutes are evident. A person supposedly may seek jury service to influence the result for or against a particular litigant; he may seek service because he has some particular social philosophy he wishes to forward. Whether that philosophy be in favor of the Government or in favor of persons accused of crime, in favor of plaintiffs, or in favor of defendants, is immaterial.

There are many people, or groups of people, who hold strong opinions as to the desirability or undesirability of various federal laws. If the door is opened for such groups

23. Typical of these statutes is that of Colorado which provides that any person who shall do any act for the purpose of procuring his own name or the name of any person to be placed upon the jury list except as provided by the statute shall be guilty of a misdemeanor punishable by a fine of $10.00 to $1,000.00 or not more than 1 year or both. The act further provides that if any jury commissioner or other official shall place any name on the jury list at the request or solicitation of any person he shall be guilty of a felony punishable by a penitentiary sentence of from 1 to 3 years. Colo. Rev. Stats. (1953) Chap. 78, Art. 3, Sec. 78-3-11, 12. Cf. *Code of Alabama*, Title 30, Sec. 41, Par. 50; *Arkansas Stats.* (1947) Sec. 41, Par. 2809; *Iowa Code Ann.* Vol. 40 Sec. 609.2(8), 609.46; *Burns Indiana Stats.* 4-3304, 9-1501; *Illinois Rev. Stats.* (1951) Chap. 78, Sec. 13; *Kansas Gen. Stats.* (1949) Chap. 43, Art. 1, Sec. 102, 127; *Kentucky Rev. Stats.* Sec. 29.380, 29.990; *Ann. Laws of Massachusetts* Vol. 8A, Chap. 234 Sec. 37, 38; *Michigan Stats.* Ann. Vol 20, Chap. 266, Sec. 27.246, 27.277; *Minnesota Stats.* Ann. Chap. 628, Sec. 43; Chap. 593, Sec. 05; *Vernon's Ann. Missouri Stats.* Chap. 494, Sec. 494.070, 494.180; *Rev. Stats. Nebraska* (1943—reissue of 1956) Art. 16, Sec. 25-16; *Nevada Rev. Stats.* Chap. 199, Sec. 199.060; *New Mexico Stats. Ann.* 1953 Vol. 4, Chap. 19, Sec. 19-1-11, 19-1-12, 19-1-5; *New Jersey Stats. Ann.* Title 2A Sec. 2A; 72-8; *New Hampshire Rev. Stats.* Ann. Chap. 500, Sec. 500:22; Pages Rev. *Ohio Code Ann.* Title XXIII Sec. 2313.27, 2313.99; *Oregon Rev. Stats.* Chap. 10, Sec. 10.080(1) (2), 10.990; *Purdon's Pennsylvania Stats.* Ann. Title 17 Chap. 11, Sec. 1290; *General Laws of Rhode Island* (1956) Title 9, Sec. 9-10-6; *South Dakota Code* (1939) Chap. 13.12 Sec. 13.1209, 1210; *Tennessee Code Ann.* Title 39, Chap. 8, Sec. 39-808, Title 22, Chap. 2 Sec. 22-216; *Utah Code Ann.* (1953) Title 78, Chap. 46 Sec. 78-46-16, 78-46-15; *Code of Virginia* (1950) Title 8, Chap. 11, Sec. 8-176, 8-203; *West Virginia Code* (1961) Chap. 52 Sec. 5264, 5285; *West's Wisconsin Stats. Ann.* Chap. 255, Sec. 255.03(2), 255.031.

to infiltrate themselves onto federal juries, dispassionate consideration of cases by a true cross-section of the population is frustrated and the jury list is laid open for infiltration by pressure groups.

It may be noted that one of the lists of volunteers which was used here was a list of "ladies [who] are all very civic minded" (S. 160). It may be doubted that a jury infiltrated by "very civic minded" ladies would give wholly dispassionate consideration to an asserted case of tax evasion or that such a jury would give dispassionate consideration to a case in which a prosecutor charged some unfortunate citizen with possible violation of the Mann Act. Moreover, "very civic minded" means different things to different people—to some it means insistence on state's rights, to others it means subordination of state doctrines in fields in which the federal government has legislated; to some it means insistence on orthodox religious tenets, to others anything smacking of obscenity is necessarily "un-civic."

Reference to Appendix D hereto will show that 9 members, or 39%, possibly 10 members, or 43% of this grand jury were volunteers. It is obvious that such a jury could not possibly represent a true cross-section of the population for it is a notorious fact that 39% of the population does not volunteer to serve on juries. On the contrary, courts have trouble getting jurors. By the very act of volunteering the volunteers remove themselves from a normal cross-section. A jury, 39% of which sought the position, obviously is far from a cross-section of the population.

Theoretically, under the federal jury statute in effect in 1952 and 1953 federal courts were protected against volunteers in at least 26 of the states because federal jury selection officials were bound by state, as well as federal

statutes as to competency of jurors. That no longer is the case. There is now no statute binding on federal jury selection officials which by express terms precludes acceptance of volunteers on federal juries. (28 U. S. C. A. Sec. 1861.) If the evil of volunteers is to be curbed or stamped out that must be accomplished by action of this Court.

In the case at bar several of the jurors suffer double incompetencies, that is, they were selected by Jongsma, a wholly unauthorized person and thus were incompetent *and* were also volunteers and were statutorily incompetent under the law of Illinois. In the case of selections by the Clerk, it will be found that some bore double incompetencies of being taken both from the private membership list of a private club and having authorized (volunteered) use of that list as a source of jurors. Thus the percentages we give as to the percentage of membership of one or the other of the juries who were incompetent are both cumulative and to a degree are duplicative.

D.

**The Clerk of the Court Used No Method Designed to Secure a Cross-Section of the Population But Relied Almost Entirely Upon Selection of Names From Lists of Private Organizations and Upon Nominations of Former Jurors, Largely Grand Jurors.**

When one turns to the method of selection used by the Clerk of the Court for his half of the names which went into the wheel, one comes to the startling fact that approximately 70 to 75% of the Clerk's selections were made, according to his estimate, directly or indirectly from membership lists of private organizations (S. 182). Even if the Clerk's estimate be not wholly precise, the percentage necessarily is so high as to show shocking disregard of this Court's command to the Northern District of Illinois

in *Glasser* v. *United States*, 315 U. S. 60, that membership lists of private organizations not be used as a source of prospective jurors' names.[24]

Most of the balance of the Clerk's selections were nominees of former jurors, largely grand jurors. These nominees in many instances suffered the further disability of being volunteers who had been contacted by former grand jurors or club members and had offered to serve. (See, for example, Mrs. Schaefer's letter at S. 160, or the "Blue Ribbon Group" at S. 191-192.)

The reflection of these improprieties in the instant grand jury was that 2 of the Clerk's selections were volunteers, 6 were nominees of former grand jurors, 1 was the nominee of a former petit juror, and 1 was perhaps a volunteer (App. D hereto). On the petit jury 2 members were taken from private organization membership lists, 5 were recommended by former jurors, and 1 was recommended by an unknown individual. Perhaps the most amazing thing is that the identical membership list (that of the Illinois League of Women Voters), use of which this Court condemned in *Glasser*, was used despite and after *Glasser;* one of the petit jurors who convicted petitioners came from that condemned list (App. D hereto).

The grand jury furnishes a clear example of the inbreed-

24. The record indicates that the Clerk resorted to the membership rosters of the organizations set forth in this note. We believe this list to be complete, or nearly so. The titles of the organizations demonstrate that the Clerk was reaching for members of the allegedly "better" element of society, whereas juries are supposed to be composed of rich and poor, saints and mild sinners alike. The Clerk's list follows: Bryn Mawr Women's Club, S. 141; South Shore Y.M.C.A., S. 141; League of Women Voters, S. 134; St. Killian Altar and Rosary Society, S. 132; Women's Club of Evanston, S. 145; Catholic Women's League, S. 149; South Shore Temple, S. 148; Parent-Teachers Association, S. 181; Friends of Drama, S. 150; Auburn Park Lions Club, S. 151; Mount Carmel High School Parents of Students, S. 152; Lawmen's League of the North Side Christian Church, S. 166.

ing or self-perpetuation that was bound to result from the methods employed by the Clerk: Six members (26%) were nominees of former grand jurors. Persons being investigated or tried for crime are entitled to have their fates settled by a true cross-section of the population and not by nominees of former grand jurors who have made their nominations after they have had a month's indoctrination by prosecutors. Grand jurors receive a one-sided experience in criminal law. For a month or more they learn the problems of prosecutors. Their experience unleavened by the moderating teachings or examples of a judge or by the contrary views of lawyers representing defendants. It is highly likely that if grand jurors have become interested enough in criminal law enforcement to make nominations of succeeding grand jurors, they have become sympathetic to the problems of prosecutors and will tend to nominate persons they believe may share that sympathy. Certainly the system of self-perpetuation, when carried to the extreme to which it was carried in the Northern District of Illinois, together with extreme reliance on the membership rosters of private clubs cannot produce, and is anathema to, selection of a true cross-section of the population.

So far as the use of the membership lists of private organizations as a source of names is concerned, there is little that need be said. This Court in *Glasser* v. *United States* in 1942 emphatically told all and jury selection officials, specifically those of the Northern District of Illinois, not to use such lists, and particularly not to use that of the Illinois League of Women Voters. This Court's command was flagrantly disobeyed. The dignity of the Court and the future of the jury system demand meaningful corrective action.

The *Glasser* case not only forbids the use of private membership lists as a source of selection of prospective

jurors, but lays down the general principle which should govern courts in protection of the jury system. This Court said, "tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will ensure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted (*Glasser v. United States*, 315 U. S. 60, 86).

Here the tendencies toward improper selection were not slight but were massive. The methods used were grossly improper; they were not designed to ensure trial by a representative group but by a specially selected group of believed "good" jurors. These undermining and destructive processes, much less than being sturdily resisted by the courts below, in this case have been condoned.

E.

**Petitioners Are Entitled to Raise the Jury Points.**

**In the Government's Brief in Opposition to certiorari herein no contention was made that the juries were legally selected. Nor can such contention well be made, for the Jury Commissioner's abandonment of his duties and the methods of selection employed by both Jongsma and the Clerk violated virtually every basic rule this Court has laid down for jury selection, rules, which for the welfare of the country, must be made to have vitality and strength.**

The Government's position (Brief in Opp., p. 19) is that Criminal Rule 12(b)(2) provides that the objections must be raised before trial or be deemed waived, and that petitioners "failed to make any showing of prejudice which would justify the Court in granting relief from the waiver." Criminal Rule 12(b)(2) provides in relevant part:

"*Defenses and Objections Which Must Be Raised.*

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. * * *"

The issue presented by the Government's position is clear:

*First*, Criminal Rule 12 pertains only to objections pertaining to defects in the institution of the prosecution. By its terms, therefore, it has application only to the objections petitioners raise as to the grand jury; it has nothing to do with the same objections as applied to the petit jury. The Government's contention as to waiver, if valid, would not save the petit jury.

*Second*, the Government concedes that the rule provides that a court "for cause shown" may grant relief from the waiver which arises from a failure to challenge the array of an indicting grand jury before trial. However, the Brief in Opposition would convert the words "*for cause shown*" which actually appear in Rule 12(b)(2) into "*showing of prejudice*," which words are not in the Rule. No authority is cited for this conversion or interpretation of Rule 12(b)(2), and we think none can be, for *United States* v. *Ballard*, 329 U. S. 187, 195, makes it clear that when a showing is made that impermissible methods of selection have been used, it is not incumbent upon a defendant to show that actual prejudice resulted to him in the decision of his matter. It is enough that he show that seriously erroneous standards of selection were used and that damage has been done to the jury system.

*Third*, the points petitioners raise are their constitutional rights to have matters concerning them considered

and passed upon by a fairly and lawfully selected grand jury, and their constitutional rights upon indictment, to be tried only by a fairly and lawfully selected petit jury. Petitioners are not raising hypertechnical criticisms as to minor deviations from statutory precepts in impanelling jurors. They are raising basic questions as to the composition of the juries and are asserting constitutional rights fundamental to our system of justice. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." (*Gouled* v. *United States*, 255 U. S. 298, 313.) "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (*Horpel* v. *Helvering*, 312 U. S. 522, 557.) Rule 12 is but a technical rule of procedure designed to aid in the orderly administration of justice rather than to thwart it.

Ample cause, we submit, exists for excusing any believed waiver of petitioners' rights to object to the indicting *de facto* grand jury:

1. The Government, which by a wholly unique procedure, after trial, verdict, judgment, appeal, and while the case was pending in this Court upon certiorari, succeeded in having all determinations up to that point vacated or suspended and the case brought back to the trial court for a reopening of a pre-trial suppression of evidence hearing. When the case was in this re-opened posture, petitioners filed their motions attacking the jury selection procedures. In its opinion in this very case this Court remarked that the fair administration of justice is not "a one-way street" (355 U. S. at 244). It would be a cruel anomaly were it held that the prosecuting sovereign can reopen a criminal case at the pre-trial stage but that the indicted citizen in the same case did not have the same right; it would be particularly repellant to civilized notions of justice were it held that the indicting sovereign could so reopen a case upon a charge which subsequently proved to be false, *i.e.*,

that the indicted defendants had concocted a perjurious record, while the indicted defendants could not reopen it upon a valid charge which they proved to the hilt, *i.e.*, that they were indicted by a grand jury 56% of whose members had been selected by a wholly unauthorized stranger to the courts and most of whose members were selected through use of impermissible standards regardless of who selected them.

2. Rule 12(b)(2) does not in express terms define the nature of the "cause" which will warrant relief from waiver. However, the second sentence of the rule says that the motion shall include all objections "then available to the defendant." Two concepts are thus involved, timeliness and availability of facts or evidence. Construing the rule in its entirety and reasonably, we suggest it means that a defendant must raise any objections as to the institution of the prosecution against him of which he reasonably should have knowledge and which were reasonably available to him before trial.

3. It may be conceded that the facts as to the jury selection irregularities were in existence at the time of the indictment herein. Literally, those facts were available to petitioners. However, in a meaningful sense, they were not available to them unless petitioners are to be deprived of their right to the presumption that public officials properly perform their duties. It long has been the law that public officials are presumed to fulfill their duties until the contrary is shown. (*Philadelphia & T. R. Co. v. Stimpson*, 14 Pet., 448, 458; *Weyauwega v. Ayling*, 99 U. S. 112, 119; *Quinlan v. Greene County*, 205 U. S. 410, 420; *United States v. Chemical Foundation*, 272 U. S. 1, 14.) A citizen is not required, at least until he is put upon notice, to act as a watchdog on jury commissioners and court clerks to see that they fulfill their duties and to see that they are not in virtual contempt of Supreme

Court orders telling them not to use private membership lists for purposes of jury selection.

4. The illegalities here were not of a kind readily to come to the notice of litigants or lawyers. Where women are systematically excluded from jury service, or persons of color are so excluded, mere observation of the venire for a petit jury may tend to put a litigant on notice of the possibility of such exclusion. But there was nothing external here that would destroy the usual presumption that the officials were performing their duty. As quickly as petitioners were put on notice of the irregularities, they moved promptly, and the membership of the District Court moved promptly to correct them for future cases (App. 150). But that did petitioners no good. And an opinion such as the present Court of Appeals opinion herein serves only to invite tampering with jury selection procedures by condoning violations of jury principles unless, contrary to the preception of this Court, the litigant can show that some type of undefined "actual prejudice" resulting particularly to him.

We submit that *Ballard* v. *United States*, 329 U. S. 187, disposes of the alleged waiver question in this case. This Court permitted a question as to the exclusion of women from jury service to be raised on a second appeal to this Court after the point had been abandoned by failure to brief or argue it on an original appeal to the relevant Court of Appeals and on complete waiver of it on a second appeal to the Court of Appeals. *Ballard* stands for the broad proposition that when a basic question as to jury selection procedures exists in a case, and when an evil has been committed that strikes at the foundation of proper jury selection procedures, no technical rules of procedure prevent this Court from disposing of the point on its merits and in a manner consistent with preservation of the jury system.

V.

**THE JURY WAS INSTRUCTED IT COULD USE AGAINST SULLIVAN EVIDENCE NOT OFFERED OR ADMITTED AS TO SULLIVAN.**

The evidence against Petitioner Sullivan was so limited upon the original trial that Judge Nordbye reserved decision on Sullivan's Motion for Acquittal to see what the jury would do, and then after the jury verdict he requested briefs and pondered the matter for five weeks. The opinion of Judge Nordbye denying Sullivan's Motion for Acquittal notes the "comparative paucity of the evidence which refers directly to Sullivan." (R. 3255.)

The Government's case against Sullivan was based upon a single alleged admission which Lubben said Sullivan made to him about February 14, 1946 in Sullivan's office. (R. 859.) The morning after he so testified, Lubben startled the Court by voluntarily recanting his testimony because of overnight "divine guidance." (R. 921.) He then stated that he did not talk to Sullivan in February 1946 in Sullivan's office. Only this recanted story was the theme of Judge Nordbye's denial of acquittal for Sullivan. (R. 3250.) The Court of Appeals gave prominence to this alleged extra-judicial admission of Sullivan, although all extra-judicial admissions "must be received with caution" (*Wilson* v. *U. S.* (1896) 162 U. S. 613, 621), and the talebearer here had recanted.

What above all denied Sullivan a fair trial was that in the instructions the jury was told specifically they could consider against him evidence which the Court had repeatedly said was not admissible against Sullivan, and which the Government did not even offer against him.

The most important evidence on the trial was the "Recapitulation" and supporting sheets turned over to the

Treasury. The Court correctly noted that such evidence "was not to be considered against Sullivan." (Pet. 70.)

But to the contrary, Judge Nordbye had instructed the jury that such evidence was to be considered against Sullivan (R. 2969):

> "You have heard the testimony regarding Cain's alleged admission as to the falsity or incompleteness of those tax returns, and his explanation as to why, in his opinion, at the time they were false and inaccurate. [This is what the Court of Appeals calls 'extracts from Cain's testimony at the suppression hearing * * * not to be considered against Sullivan'.]
>
> "There has also been received in evidence work sheets and data compiled by Mr. Busby, and certain data compiled by Mr. Cain with respect to an alleged tentative compilation of the overages and the disposition such receipts by Shotwell, for raw materials, and the nature and character of the disposition which was allegedly made. [This is what the Court of Appeals calls 'the recapitulation statements * * * not to be considered against Sullivan.']
>
> "*All* of the testimony should be considered by you, *that is, all that testimony should be considered by you* in view of the circumstances, and understanding of the *parties* insofar as it may bear upon any intent of the *parties* to wilfully violate the income tax laws or *their* good faith, or lack of good faith in the matter." (Emphasis and material in brackets ours.)

The foregoing instruction is diametrically opposite to the fact that such evidence was not usable against Sullivan, and yet is the instruction upon which Sullivan's fate was decided by the jury. It is flagrantly wrong and wholly indefensible. In a case where there was a restriction of evidence as it went in, but an instruction which let the jury assume they could convict on such evidence, Justice Frankfurter's opinion in *Anderson* v. *U. S.* (1942), 318 U. S. 350, 356, shows a new trial must be given.

## CONCLUSION.

There are several steps which might be taken to correct the manifold injustices in this case. We suggest the Court should weigh them in the light of broad policy considerations:

Petitioners, who always have protested their innocence, and who took the stand initially in an endavor to prove it but were overcome by perjurer Lubben and his doctored records, have been tortured long enough. It is fourteen years since they voluntarily went in and disclosed the matters which might increase the tax Shotwell already had paid for 1945 and 1946 of $827,000. The demurrer to the motion to dismiss which motion pleaded immunity in bar should have been overruled. It is nearly seven years since the Court of Appeals, on June 15, 1955, ordered suppression of unconstitutionally obtained evidence and directed a new trial. That order was not based upon a perjured record and was proper. However, the new trial was thwarted by the presentation of a grossly unjustified Motion to Remand in this Court. Had a new trial actually been held in 1955 or 1956, the witnesses might still have had some reasonable recollection of what had occurred in 1944, 1945 and 1946, but a new trial in 1962 or 1963 would be one in which memories could not be accurate, and would be offensive to the principle that every citizen should have a prompt trial in a criminal case. We, therefore, respectfully suggest that proper disposition of this case is one which should result in its dismissal whether on that or some other ground.

If we consider relief from a technical point of view, it is apparent that the first error was in permitting an illegally composed body to return an indictment. This error calls for reversal with directions for dismissal of the indictment.

The next major error was the trial before an illegally composed petit jury. This warrants a new trial.

The next error was the introduction in evidence of confessional material obtained from petitioners under promises of immunity. This could be corrected by an order here vacating this Court's order of remandment and all subsequent proceedings and directing the Court of Appeals to reinstate its original order of June 15, 1955.

Connected with the suppression issue is the issue concerning abuse of this Court's procedures in obtaining the order of remandment. We suggest a remandment so obtained should be vacated.

Certainly, convictions cannot be upheld after it is known that the record on which the original jury acted was tainted by Lubben's perjury and doctored records, which the jury were told by the United States were true (R. 2879, 2937) and which they believed were true (R. 3073). This warrants a new trial.

Sullivan was convicted on evidence which never had been admitted as to him. This warrants a new trial as to him.

Respectfully submitted,

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## APPENDIX A.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U. S. C. 1952 ed., Sec. 3761:

"SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Depart-

ment of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise."

28 U. S. C. (1952 Edition):

"§ 1861. *Qualifications.*

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless: • • •

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held. (June 25, 1948, ch. 646, § 1, 62 Stat. 951.)"

• • • • • •

"§ 1864. *Manner of drawing; jury commissioners and their compensation.*

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

• • • • • •

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines. (June 25, 1948, ch. 646, § 1, 62 Stat. 952)" Ill. Rev. Stats. 1951, Ch. 78:

"§ 13. When by reason of challenge in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel is exhausted, the court may direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial, but upon objection by either party to the cause to the sheriff summoning a sufficient number of persons to fill the panel, the court shall appoint a special bailiff to summon such person: Provided, the same person shall not be appointed special bailiff more than once in sixty days. Any person who seeks the position of a juror, or who asks any attorney or other officer of the court or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge. Any attorney or party to a suit pending for trial who shall request or solicit the placing of any person upon a jury, shall be deemed guilty of a contempt of the court and be fined not exceeding one hundred dollars ($100.00), and the person so sought to be put upon the jury shall be disqualified to serve as a juror for sixty days. [As amended by act approved June 21, 1933. L. 1933, p. 684. In force Jan. 1, 1934.]"

## APPENDIX B.

### EXCERPTS FROM STATEMENTS OF THE DISCLOSURE POLICY.

1. "Taxpayers who have failed to declare their full income and pay the tax due 'may escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started'." (Statement of Secretary of the Treasury Morgenthau, May 28, 1945, R. 19.)

2. "* * * the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. *'And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out'.*" (Secretary of Treasury Vinson, Aug. 21, 1945, R. 19.)

3. "Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases." (Press Release of Treasury Department, October 5, 1945, R. 3132.)

4. "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. * * * *The simple 'statement that 'I have filed false tax returns and I want to make the Government whole' would constitute a complete disclosure.*" (Italics added.) (Address by J. P. Wenchel, Chief Counsel of the Bureau, publicly released by Treasury, May 14, 1947, R. 3134, 3136.)

5. "One of the important elements in settling cases with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order *to assure himself against criminal prosecution*, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case." (Italics added.) (Press Release by Secretary of the Treasury Snyder, May 25, 1947, R. 3140.)

## APPENDIX C.

### CHRONOLOGY OF LITIGATION AND THE RE-INVESTIGATION.

(Steps in this and connected litigation in Roman; steps in re-investigation in italics.)

• • • • • •

Government counsel attached a "Chronology of Litigation" as an appendix to their brief when the case was first here. (Brief for United States, No. 1, O. T. 1957.)

Since the case has become even more complicated we believe an updated "Chronology" will be helpful. Moreover, since we charge evidence was withheld from this Court in 1956 and 1957 when the prosecutors sought the remandment order, a table which places principal events of the re-investigation (so far as the record reveals them) in chronological relationship to the steps in the litigation may be of assistance. (Petitioners are referred to as "defendants" in this Chronology.)

• • • • • •

March 14, 1952: Indictment returned.

Oct. 6, 1952: Motion to suppress evidence based on defendants' "voluntary disclosure" of early 1948 filed.

Nov. 12, 13, 21, 1952: Hearing on motion to suppress. (It was at this hearing that the Government in 1957 asserted Busby, Cain and Sauber gave fantastic perjury.)

Nov. 21, 1952: Order entered denying motion to suppress evidence.

March 19, 1953: Revenue Agent Mann, Treasury Agent in charge of case, suffers "complete mental breakdown" and was "unresponsive to questions put to him." (R. 551-554.)

Sept. 15 through Oct. 16, 1953: Trial on the merits.

Dec. 15, 1954: Defendants' briefs filed in Court of Appeals *inter alia* attacking Government star witness Lubben's "records" as falsified and his testimony as perjurious.

Dec. 15, 1954: *Revenue agent in Chicago objects to way case being handled. (Stein aff. attached Mo. to Remand.)*

March, 1955: *Internal Revenue Service national office entertains "strong suspicion" the voluntary disclosure might not have taken place in March 1948. (App. 198-9, Stein aff. attached Mo. to Remand.)*

March 31, 1955: Defendants' reply brief filed in Court of Appeals *inter alia* further attacking Lubben's testimony and "records" as perjurious.

April 29, 1955: *Internal Revenue Service commenced full scale investigation of administrative handling of the Shotwell Manufacturing Company and related income tax cases for years 1944 through 1949. (Stein aff. attached Mo. to Remand (Amended,) pp. 7-13.)*

June 15, 1955: Decision of Court of Appeals reversing judgments of conviction and remanding for new trial with instructions to sustain defendants' motion to suppress.

August 10, 1955: *After interrogation (App. 1419) 29 page sworn statement (App. 1419) taken from Revenue Agent Lima (who commenced the examination of Shotwell's affairs pursuant to the disclosure) in which Lima did not claim he ever filled out a revenue agent's report, knew of any settlement, computed tax at approximately $20,000, or prepared a form 870 (App. 1420).* (See contra representations to this Court recited in 355 U. S. at 240, n. 15.)

Sept. 15, 1955: Jeopardy assessment claiming $3,172,000 taxes, penalties and interest for the years 1944-5-6 entered against Shotwell. Of this, $1,036,000 was asserted for taxes for 1945-6 as contrasted with $286,000 deficiency asserted in this case. On September 23 Company filed action in District Court for injunction restraining collection on ground assessment was arbitrary and capricious. (Ultimately went to Ct. of Apps. as *Homan v. Long*, 242 F. 2d 645.)

Oct. 17, 1955: Petition for writ of certiorari and conditional cross-petition for writ of certiorari filed.

Nov. 8, 1955: *Stanley Graflund gives Treasury agents 22 page recorded statement (App. 985). No claim made that Busby did not know of black market transactions until approximately July 1, 1948 (App. 1177).* (See contra representation to this Court recited in 355 U. S. at 239.)

Dec. 1, 1955: *Department of Justice received letter from Chief Counsel Internal Revenue recommending grand jury investigation of possible violations of Titles 18 and 26 of the United States Code. (So asserted in Government's original Chronology.)*

Dec. 6, 1955: Solicitor General, in letter to Clerk, advised this Court that investigation by Internal Revenue Service was in progress; that upon receipt of full report Government expected to in this Court motion remand case to District Court on ground of perjury by or on behalf of defendants as to fact of voluntary disclosure. Solicitor General requested this Court defer action on certiorari petitions.

Dec. 9, 1955: Attorneys for defendants, in letter to the Clerk, advised this Court that Treasury Department had been grossly misinformed and that charges of perjury and of asserted "new" evidence were unwarranted.

Jan.-March, 1956: *Department of Justice reviewed files, determined to institute grand jury proceedings and assigned case to two special attorneys. (So asserted in Government's original Chronology.)*

March or Apr., 1956: *Defendant Huebner secretly meets with Government attorneys (App. 711).*

Apr. 9, 1956: Grand jury investigation commenced in Chicago to determine whether various indictable offenses may have been committed, including perjury, obstruction of justice and conspiracy to evade taxes, by defendants and others.

Apr. 10, 1956: Grand Jury subpoena issued to Leon J. Busby, Shotwell accountant, directing him to produce numerous books and papers.

Apr. 11, 1956: Defendants filed Complaint and Petition in the District Court praying injunction restraining Gov-

ernment attorneys from presenting any evidence to grand jury which the Court of Appeals ordered suppressed in this case.

Apr. 17, 1956: District Court granted Government's motion to dismiss defendants' Complaint and Petition of April 11. Defendants appealed.

Apr. 18, 1956: Court of Appeals set May 2, 1956, as date for oral argument on above appeal and stayed subpoena duces tecum issued to Leon J. Busby or any other subpoena of like tenor.

Apr. 1956: *Revenue Agent Lima, in Chicago for approximately one week preparing to testify before new grand jury; did not testify (App. 1431-1437).*

Apr.-May, 1956: *Defendant Huebner secretly authorized new lawyer (without discharging his counsel of record) to open negotiations with Government (App. 711).*

May 10, 1956: *H. Stanley Graflund gives prosecutors 58 page recorded statement in which he repeatedly tells of a trip with Busby to Lubben in New York early in 1948 and that "It was on that return trip that I talked to Mr. Busby about the Shotwell Manufacturing Company and its involvement with Mr. Lubben." (App. 1125-1130.)* (See contra affidavit to this Court recited in 355 U. S. at 239.)

May 11, 1956: Court of Appeals affirmed judgment of the District Court dismissing the Complaint and Petition of April 11. *(Homan Manufacturing Company, et al. v. Russo, et al.*, 233 F. 2d 547.)

June 1, 1956: Solicitor General, in letter to Clerk of this Court asserted that the stay entered by Court of Appeals April 18, 1956 and in effect until May 11, 1956 preventing enforcement of grand jury subpoena which would have compelled Busby to submit to the grand jury document which original Court of Appeals opinion herein held should be suppressed, had delayed grand jury inquiry and requested this Court to defer action on the certiorari petitions.

June 6, 1956: Counsel for defendants, in letter to the Clerk, advised this Court that only impediment to the

grand jury proceedings had been a limited stay with respect to the suppressed documentary evidence; that if the Department had discovered any new evidence that it legitimately could have presented, it would long ago have been presented to the grand jury; requested action on the certiorari petitions.

June 11, 1956: This Court granted Solicitor General's request to defer consideration of the petitions for writ of certiorari. (351 U. S. 980.)

June 14, 1956: Company granted summary judgment by District Court invalidating $3,172,000 jeopardy assessment of September 15, 1955 upon findings it was based upon conclusions of Revenue Agent Mammel, was patently arbitrary, and wholly void; that it was not necessary to decide whether such action sprang from malice or incapacity; that Mammel suffered a complete mental breakdown on March 19, 1953, and in February 1956 remained unable to recall basic rules of taxation and points developed during the criminal trial of late 1953 to which he should have applied fair judgment. (Government immediately appealed.)

July 18, 1956: Defendants and owners filed petition in the District Court entitled *In The Matter Of The April 1956 Term Grand Jury* praying protective power of the District Court against alleged misuse of the grand jury and requesting that the grand jury minutes be produced in open court; that the grand jurors be interrogated by the court; that counsel for the grand jury be admonished or disciplined; and that certain Treasury agents be punished for contempt. District Court granted Government motion to dismiss.

July 22 and 24, 1956: *Defendant Huebner gives prosecutors and Treasury agents tape recorded conferences; reduced to 21 page memorandum July 28, 1956 (App. 555), in which he asserts black market overages originally commenced at 5¢ a pound [half the rate that had been asserted by Lubben], that certain goods did not bear any overage whatsoever, and Lubben's records indicated he was "trying to lay off" money on somebody.*

July 26, 1956: *Agent Lima, after considerable interrogation, taken before grand jury; gave no testimony about supposed settlement, making out a revenue agent's report computing tax at $20,000, or preparing a Form 870. (App. 1137-1141.)* (See contra representation to this Court recited in 355 U. S. at 240, n. 15.)

July 27, 1956: Defendants and others filed notice of appeal from the District Court's order of July 18, 1956 re grand jury.

July 29, 1956: *Defendant Huebner gives prosecutors tape recorded conference; reduced to 19 page memorandum Aug. 21, 1956 (App. 555).*

Aug. 7, 1956: *Defendant Huebner gives prosecutors tape recorded conference; reduced to 9 page memorandum Aug. 28, 1956 (App. 555).*

Aug. 21-22, 1956: *Defendant Huebner before grand jury, inter alia swears overages started at 5¢ (App. 947-952).*

Aug. 26, 1956: *Joint conference of prosecutors with Graflund and Huebner; reduced to 21 page typewritten memoranda on Aug. 27, 1956 (App. 555).*

Aug. 28, 29 and 30, 1956: *Graflund before grand jury (App. 1151); repeatedly swears he fully informed Busby of the black market dealings on the club car of train coming from New York in January, 1948 (App. 1198-1201). Makes no claim Busby did not know until late June 1948 (App. 1138).* (See contra affidavit to this Court recited in 355 U. S. at 239.)

Sept. 17, 1956: *Defendant Huebner gives prosecutors conference; reduced to 4 page memorandum Sept. 18, 1956 (App. 555) in which he says he has no recollection of Chicago Athletic Club meeting with Sullivan and Urban in July 1948 at which purchase and destruction of Lubben's records was discussed; doesn't recall ever being in Chicago Athletic Club with Urban (App. 854).* (See contra affidavit to this Court attached to Supplement to Mo. Remand.)

Sept. 19, 1956: Prosecutor Russo makes affidavit referred to in entry of Oct. 15, 1956, *post.*

Sept. 26, 1956: *Defendant Huebner gives prosecutors conference; reduced to 6 page memorandum Oct. 19, 1956*

*(App. 555); reaffirms statement of Sept. 17 that he "recalls nothing" of meeting with Sullivan and Urban at Chicago Athletic Club (App. 854).*

Oct. 4, 1956: *Revenue Agent Lima, after considerable interrogation and becoming "scared" (App. 1444), placed under lie detector, says he did not recommend case be settled for $20,000, did not submit or prepare a revenue agent's report and does not know if a Form 870 was prepared: Told lie detector operator he had been interrogated so much that he had trouble recalling what was in his mind and what he had heard or had been asserted to him (App. 1445-1451, 1455-6, 1478).*

Oct. 8, 1956: *Revenue Agent Lima, after further interrogation (App. 1453) and being told lie test was inconclusive (App. 1454), taken before grand jury. Still no testimony as to preparing a report, a $20,000 tax or a Form 870 (App. 1465). Said he formed "impression" about Aug. 1, 1948 that Busby had learned of Shotwell's black market problem 3 to 5 months prior thereto (App. 1387).*

Oct. 15, 1956: Motion to Remand filed by Government in this Court based on affidavits of Stein (Revenue Service lawyer), Yaden (Revenue Service detective), Howard (Dept. Justice) and Russo (Dept. Justice), in which latter swears, as of Sept. 19, 1956, "From statements of fact within the personal knowledge of witnesses • • • and from facts and circumstances already in the record it appears that prior to June 21, 1948 • • • no disclosure, voluntary or otherwise, had been made • • •"; that Urban had informed him of an asserted meeting with Huebner and Sullivan to discuss acquiring Lubben's records and destroying them; no mention was made of Huebner's denial on Sept. 17 (see *supra*) of such meeting.

Nov. 13, 1956: Decision of Court of Appeals reversing the District Court's order of July 18, 1956, and remanding with directions to enter injunction prohibiting use civilly of suppressed material. *In The Matter of The April 1956 Term Grand Jury*, 239 F. 2d 263.

Nov. 15, 1956: Motion to Remand (Amended) filed by Government in this Court based upon same affidavits of Stein, Yaden, Howard and Russo.

Dec. 19, 1956: *Revenue agent Lima further interrogated by prosecutors in Washington, D. C. and gives 32 page (App. 989) sworn statement, changing story in details (App. 1501) and now sometimes talking about having filled out revenue agent's report (App. 1483) and sometimes mere "computations" (App. 1495-7). No mention of Form 870 (App. 1478-9).*

Dec. 24, 1956: Defendants' Answer To Motion (Amended) To Remand filed in this Court. It strongly asserted, *inter alia*, that the Russo affidavit was mere hearsay (p. 27, thereof *et seq.*) and untrustworthy (Note at p. 11 thereof.)

Dec. 31, 1956: Motion of Frank J. Huebner, *pro se*, To Withdraw From Opposition To Government's Petition For Certiorari, Motion To Withdraw From Conditional Cross-Petition For Certiorari, And Consent To Government's Motion To Remand, filed in this Court.

Jan. 7, 1957: Motion of Harold A. Smith and others for leave to withdraw as counsel for Frank J. Huebner filed in this Court.

Jan. 9, 1957: Government's Supplement To Motion To Remand filed in this Court based on affidavit of defendant Huebner dated Dec. 17, 1957.

Jan. 22, 1957: *Revenue Agent Lima interrogated by prosecutors (App. 1501-3).*

Jan. 23, 1957: *Revenue Agent Lima again taken before grand jury; now swears that in 1948 he filled in the formal parts of revenue agent's report (App. 1505) re Shotwell; computed a tax of approximately $20,000 (App. 1504); is hazy and does not know whether he obtained a Form 870 (App. 1479); has no knowledge that the Shotwell tax case was "fixed," and has heard nothing of any money being passed to anyone (App. 1513); explains his recantations and changes as follows, "• • • when I testified the first time I thought I knew just a little about this case and, by golly, with all these conferences and interviews and refresher courses, it is amazing how much I know about it today • • •" (App. 1382). "Right after" he testified, prosecutor Russo promised to help Lima if he got in trouble in any way (App. 1506-7).*

Jan. 23, 1957: Defendants' Reply To Supplement To Motion To Remand filed in this Court, asserting, *inter alia* (p. 5 ff.), that Huebner affidavit, assuming its truth, was insufficient to overturn testimony of Busby and Cain that the former advised, and the latter decided to make, and did make, a disclosure in January 1948.

Feb. 3, 1957: *H. Stanley Graflund further interrogated by prosecutors (App. 1205).*

Feb. 4, 1957: Court of Appeals reverses summary judgment voiding jeopardy assessment and remands case for full trial. (*Homan Mfg. Co.* v. *Long*, 242 F. 2d 645.)

Feb. 17, 1957: *Huebner and Graflund further interrogated by prosecutors in presence of Lubben (App. 1205). (Lubben had moved to Puerto Rico in 1949. He was fetched from there for this "conference" in Chicago extending from Feb. 15 to Feb. 19, 1957 (App. 946).)*

Feb. 20, 1957: *H. Stanley Graflund taken before grand jury; recants previous testimony that he had informed Busby of black market dealings in January 1948 and now says Busby appeared to know nothing about them until about July 1, 1948.*

Feb. 25, 1957: This Court granted Government's petition for certiorari limited to the issues raised in the amended motion to remand and supplement thereto.

Feb. 27, 1957: Indictment returned against Cain and Sullivan and others by the April 1956 Term Grand Jury, which did not charge that anyone had committed perjury with respect to the voluntary disclosure.

March 24, 1957: Upon refusal of Government to make discovery in the civil suit attacking the $3,172,000 jeopardy assessment, District Court enters final judgment under Rule 34 voiding assessment. (Government appeals.)

July 9, 1957: Defendants filed motions in District Court attacking validity of grand and petit juries in this case (App. 15). (Denied because of pendency of case in this Court.)

Aug. 19, 1957: Graflund affidavit given Aug. 17, 1957 lodged with Clerk of this Court.

Aug. 1957: Brief for United States filed in this Court representing (p. 31) that "except to the extent it has been thwarted by the dilatory tactics of respondents the Government has endeavored to bring the true facts to light as promptly as possible"; that (p. 30) if a further hearing was granted, Revenue Agent Lima would testify that he had prepared a revenue agent's report showing a tax deficiency of about $20,000, which report he destroyed. The brief asserted that (p. 33) "The new evidence [for the reception of which the prosecutors wished the case remanded] indicates that the testimony which placed the date of the so-called disclosure in January or March 1948 was perjurious testimony of respondents and of Busby and Sauber. In fact, the so-called disclosure took place in July, 1948."

Dec. 16, 1957: Decision of this Court remanding for further proceedings (355 U. S. 233).

March 17, 1958: Continuance of new hearing granted because of defendant Cain's health (App. 216-219, 237-249, 261, 266-271, 289-312).

March 17, 1958: Defendants filed motions in District Court for particularization of the issues to be tried on the new hearing and motions again raising questions as to validity of jury selection procedures (App. 111-151).

March 21, 1958: Defendants' motion for order limiting issues or for statement of particulars denied (App. 263).

Apr. 21, 1958: Evidence taken with respect to jury selection questions (App. 315, *et seq.*).

Dec. 1-19, 1958: New hearing held before Judge Nordbye.

Apr. 15, 1959: Judge Nordbye renders opinion denying motion to suppress evidence.

May 22, 1959: Sentences entered. Cain's motion for probation on account of health denied.

## APPENDIX D.

### 1. Grand Jury.

(a) Selections Made by Roy H. Johnson.

May Bourne.....recommended by former petit juror (App. 147)

Mathew Classen.....recommended by former grand juror (App. 147)

Mary Jane Henning .....recommended by former grand juror (App. 147)

Robert J. McWalter .....recommended by former grand juror (App. 147)

Louis W. Northway..recommended by former grand juror (App. 147)

Euphemia Parker....recommended by former grand juror (App. 147)

Marion O. Rose.....recommended by former grand juror (App. 147)

John Oscar Karlson.....volunteer (App. 147)

Clarence Kruse.....volunteer (App. 147)

Lucille McDermott.....perhaps a volunteer (App. 147)

(b) Selections Made by Richard Jongsma.

Hazel S. Underhill.....volunteer (App. 417)

Wm. K. Mahn.....volunteer (App. 417)

John J. Jachera.....volunteer (App. 417)

Emma A. Schlieckert.....volunteer (App. 318, Cain Ex. 1B and 1C)

Roy L. Pierce.....telephone book (App. 331)

Fred Albly.....telephone book (App. 331)

Alexander C. Rice.....telephone book (App. 321)

James C. Delaney.....volunteer (App. 321-2)

Mae W. Peterson.....volunteer (App. 323-4)

Grace M. Lundholm.....volunteer (App. 325-6)

Jesse Devers.....telephone book (App. 326)

John Van Antwerp.....telephone book (App. 326)

Gust Uddman.....telephone book (App. 326)

**2. Petit Jury.**

(a) Selections Made by Roy H. Johnson.

Francis R. Schubert...recommended by former petit juror (App. 417)

Margaret M. Capinegro .....recommended by former petit juror (App. 417)

Jean F. Lawler.....Illinois Opera Guild List (App. 417)

Ruth L. Schiller.....League of Women's Voters List (App. 417)

Harry Marshak.....recommended by another individual (App. 147)

Leroy J. Ryan.....recommended by former grand juror (App. 147)

Stanley Grzwacz.....recommended by former grand juror (App. 147)

Rose Blondin (alternate)...League of Women's Voters List (App. 147)

(b) SELECTIONS MADE BY RICHARD JONGSMA.

Ethel A. Gassen.....volunteer (App. 329)
Arthur Amodeo.....telephone book (App. 335)
Anthony Massero.....telephone book (App. 336)
Helen Sajewski.....telephone book (App. 337)
John E. Jasch.....telephone book (App. 336)
Wm. A. Schmidt (alternate)...telephone book (App. 334)